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A TREATISE  
ON THE  
**LAW OF DIVORCE**  
AND  
**ANNULMENT OF MARRIAGE**  
INCLUDING

THE ADJUSTMENT OF PROPERTY RIGHTS UPON DIVORCE,  
THE PROCEDURE IN SUITS FOR DIVORCE, AND  
THE VALIDITY AND EXTRATERRITORIAL  
EFFECT OF DECREES OF DIVORCE

BY  
**WILLIAM T. NELSON**  
OF THE OMAHA, NEB., BAR

IN TWO VOLUMES  
**VOLUME II**

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# THE LAW OF DIVORCE.

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## ANNULMENT OF MARRIAGE.

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§ 565. In general.

566. Divorce and annulment distinguished.

567. Void and voidable.

§ 568. Void marriages.

569. Voidable marriages.

570. Defenses to nullity suit.

571. Practice and procedure.

**§ 565. In general.**—It is the purpose of this chapter to consider in a general way the nature and incidents of proceedings to annul void and voidable marriages. Not all the questions relating to the proof and validity of marriage need be included in this subject. The purpose is to state the grounds for the annulment of marriage and the effect of the nullity decree. The grounds for which a marriage was annulled by the ecclesiastical courts were precontract, consanguinity, affinity and impotence, and these are called canonical disabilities and rendered the marriage voidable. These courts also, in common with the common-law courts, declared marriages void on account of prior marriage, want of age, mental incapacity, and want of solemnization. As the church held marriage to be indissoluble and refused absolute divorce for misconduct after marriage, many doubtful interpretations were resorted to by the ecclesiastical courts to declare a marriage void. If a party agreed to marry one person and during the existence of this agreement married another, the marriage was declared void on account of precontract, and the court would compel the execution of the prior agreement. The degrees of consanguinity and affinity were greatly extended until a marriage was voidable on account of relationship of the seventh de-

gree of the canonical reckoning, or the fourteenth degree of the civil law. Sexual intercourse or fornication was held to create the same affinity as a valid marriage, and thus the validity of marriage was brought into such great uncertainty that the law was changed by legislation.<sup>1</sup> Precontract is not therefore one of the common-law grounds for annulment of marriage, and the extreme degrees of consanguinity and affinity were changed by statute before we derived our unwritten law from England.

Both the law and equity courts had jurisdiction at common law to declare a marriage void, but a direct proceeding for this purpose was brought in the ecclesiastical courts only. The jurisdiction to annul a marriage is generally conferred by statute upon certain courts, and in the absence of such statutes only courts of equity will have jurisdiction to annul a marriage in a direct proceeding, and this jurisdiction must be under some head of equity, as the power to annul contracts for fraud.<sup>2</sup> This question will be noticed under the various subjects relating to grounds for annulment of marriage.<sup>3</sup>

Where marriage is void by operation of common law or statute either party is entitled to a decree of annulment. It would seem that the incapable party would be estopped from setting up his own incapacity. But estoppel does not apply to such cases, as it cannot add validity to that which is void. The incapable party may therefore be entitled to relief.<sup>4</sup>

**§ 566. Divorce and annulment distinguished.**—The term *divorce*, in its accurate sense, denotes a dissolution or suspension by law of the marital relation. As a legal term,

<sup>1</sup> For statement of the various acts see *Wing v. Taylor*, 2 Swab. & T. 278.

<sup>2</sup> *Teft v. Teft*, 35 Ind. 44. See jurisdiction of federal courts to annul a written contract of marriage on account of fraud. *Sharon v. Hill*, 20 Fed. 3; *Sharon v. Terry*, 36 Fed. 337.

<sup>3</sup> Jurisdiction to annul for fraud, § 601. For impotency, § 675.

<sup>4</sup> See *Amory v. Amory*; 6 Rob. (N. Y.) 514; *Robbins v. Potter*, 98 Mass. 532.

For parties to nullity proceedings, see § 760.

For effect of decree of nullity, see § 1023.

Effect of void marriage at common law, see § 590.

Whether divorce or annulment for impotence, see §§ 704, 705.

and unaided by context, it means a dissolution of the bonds of matrimony.<sup>1</sup> [When a marriage is dissolved the action of the court proceeds upon proof that a valid marriage existed and created rights and liabilities. The decree of divorce usually proceeds to make a final adjustment of these liabilities. The decree of annulment declares in effect that no valid marriage ever existed, and restores the parties to their former position] and relieves them from civil and criminal liability. The decree of divorce operates from the time it is rendered, but the nullity decree relates back to the time the void marriage was entered into.

This distinction, though easily comprehended, does not appear in the early books and reports. Blackstone, in referring to the two kinds of divorce, says that the "total divorce, *a vinculo matrimonii*, must be for some of the canonical causes of impediment before mentioned, and these, existing before the marriage, as is always the case in consanguinity; not supervenient or arising afterwards, as may be the case in affinity or corporeal imbecility. For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*." The same failure to distinguish the terms *divorce* and *annulment* may be noticed in our statutes which provide that marriages may be dissolved for certain causes, among which are "any causes rendering the marriage originally void<sup>2</sup> or voidable;"<sup>3</sup> pregnancy of the wife, unknown to the husband at the time of marriage;<sup>4</sup> impotence or physical incapacity at the time of marriage; where either party has a former husband or wife living; where the marriage was procured by fraud or duress; where marriage was solemnized while either party was under the age of consent;<sup>5</sup> or when the parties to the marriage were related within the prohibited degrees. These

<sup>1</sup> *Miller v. Miller*, 33 Cal. 355.

souri, North Carolina, Tennessee,

<sup>2</sup> Washington.

Virginia, West Virginia, Wyom-

<sup>3</sup> Rhode Island.

ing.

<sup>4</sup> Alabama, Georgia, Iowa, Kansas, Kentucky, Mississippi, Mis-

<sup>5</sup> Delaware.

grounds are clearly those of annulment and not divorce. To give these statutes a literal interpretation would lead to absurd consequences not intended by the various legislatures. It is held that these statutes, when interpreted with reference to the common law and our entire system of jurisprudence, require a decree of nullity, and not a decree granting a dissolution of marriage.<sup>1</sup> Where the distinction appears in a statute which provides for both divorce and annulment, and permits the court to grant alimony upon decreeing "the dissolution of a marriage, and also upon decreeing a divorce, whether from the bonds of matrimony or from bed and board," the term "dissolution" refers to divorce and not annulment.<sup>2</sup>

**§ 567. Void and voidable.**—The terms *void* and *voidable* are ambiguous, and without the aid of other terms cannot be used with accuracy, because there are shades of meaning for which we have no word and resort must be had to other terms. It will be of some assistance to say how these terms are used with reference to marriage. A marriage is said to be *void* when it cannot be ratified or affirmed by the parties, and *voidable* when it is not absolutely invalid, but may be rendered valid by conduct affirming it, or if not affirmed it may be declared void. The term *void* is applied where some act is in violation of law, and no person is bound by it, and any person may plead and prove its invalidity. But where an act has some force, but is capable of being affirmed or disaffirmed by an interested party, it is said to be *voidable*. The decree may declare a marriage void which before it was rendered was voidable. After such decree the marriage is

<sup>1</sup> It is held that a statute permitting a divorce, "where either of the parties had a former husband or wife living at the time of solemnizing the second marriage," does not render the second marriage voidable, because it was absolutely void, and could not be considered voidable in the absence of distinct and positive legislation. *Smith v. Smith*, 5 O. St. 32. To render a divorce for this cause would in effect render the second marriage voidable, since it would exist until one party chose to apply for divorce.

<sup>2</sup> *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736.

not, in some respects and legal consequences, as a marriage which was absolutely void before decree. There is no term in common use which distinguishes between the void marriage and the marriage declared void.

**§ 568. Void marriages.**—A marriage is void when it has no legal effect, confers no marital or property rights, imposes no duties or liabilities, and is incapable of subsequent ratification. Marriages are void when declared so by statute, and when there is a valid prior marriage undissolved. The invalidity of such marriage may be shown in any proceeding, direct or collateral, by any party and at any time.<sup>1</sup> This rule seems to be so stated in the books, but there is one important exception: that after the death of one of the parties the other cannot have the marriage annulled.<sup>2</sup> It may be questioned, however, in a collateral proceeding, after the death of one or both parties.<sup>3</sup> As the void marriage created no obligations or *status*, the capable party may marry again without first obtaining a decree annulling the void marriage.<sup>4</sup> But a decree of annulment during the life-time of both parties is to be preferred, because a fair trial may be had while both the parties and their witnesses are living, and a decree of a court of competent jurisdiction will prevent subsequent litigation in other jurisdictions.<sup>5</sup> The children of parties to

<sup>1</sup> 1 Bishop, Mar., Sep. & Div., § 258, citing Shelf, Mar. & Div. 479; Wilson v. Brockley, 1 Phillim. 132; Ferlat v. Gojon, Hopkins, 478; Hantz v. Sealy, 6 Binn. 405; Gathings v. Williams, 5 Ire. 487; Hemming v. Price, 12 Mod. 432; Patterson v. Gaines, 6 How. (U. S.) 550; Fornshill v. Murray, 1 Bland, 479; Mount Holly v. Andover, 11 Vt. 226; Rawdon v. Rawdon, 28 Ala. 565; Middleborough v. Rochester, 12 Mass. 363; Higgins v. Breen, 9 Mo. 493; Smart v. Whaley, 6 S. & M. 308. This rule is approved in Williams v. Williams, 63 Wis. 58.

<sup>2</sup> Rawson v. Rawson 156 Mass. 578, 31 N. E. 653; Hinks v. Harris, 4 Mod. 182; Heming v. Price, 12 Mod. 432; Brownsword v. Edwards, 2 Ves. Sr. 243.

<sup>3</sup> Fornshill v. Murray, 1 Bland, 479; Pingree v. Goodrich, 41 Vt. 47.

<sup>4</sup> Gaines v. Relf, 12 How. (U. S.) 472; Patterson v. Gaines, 6 How. (U. S.) 550; Williams v. Williams, 63 Wis. 58; Lincoln v. Lincoln, 6 Rob. (N. Y.) 625; Martin v. Martin, 22 Ala. 86.

<sup>5</sup> See complications arising in the Gaines cases, *supra*, and also in the Hill v. Sharon cases, cited in

a void marriage are illegitimate.<sup>1</sup> Since the marriage is void, the woman did not become a wife, and is not entitled to dower or the rights of a widow.<sup>2</sup>

The rigor of the common law has been modified by legislation in most of the states. The statutes in effect provide that if the void marriage was contracted in good faith, and with the full belief that the former husband or wife was dead, the issue of the second marriage shall be legitimate.<sup>3</sup> The void marriage is in effect only voidable under statutes which provide that a void marriage shall be valid until its nullity is adjudged by a court of competent jurisdiction.<sup>4</sup> The interpretation and effect of these statutes will be considered under the appropriate subjects.

**§ 569. Voidable marriages.**—A marriage is voidable when it is not so imperfect or contrary to law that the imperfection can be waived and the marriage become legal and valid by subsequent affirmation and ratification. A voidable marriage can only be inquired into by a direct proceeding between the parties and during the lives of both of them.<sup>5</sup> Until it is set aside it is practically valid for all purposes; but when set aside the decree renders it void from the be-

36 Fed. 337. See, also, *Appelton v. Warner*, 51 Barb. (N. Y.) 270; *Teft v. Teft*, 35 Ind. 44. The right of the capable party to marry again without having the void marriage annulled exists, although the statute provides how such marriage may be annulled. This provision does not change the rule nor bestow any validity upon the void marriage. *Drummond v. Irish*, 52 Ia. 41.

<sup>1</sup> *Clayton v. Wardell*, 4 Comst. 230.

<sup>2</sup> *Smith v. Smith*, 5 O. St. 32; *Higgins v. Breen*, 9 Mo. 493; *Smart v. Whaley*, 6 Sm. & M. 808; *Randlett v. Rice*, 141 Mass. 385.

<sup>3</sup> *Gall v. Gall*, 114 N. Y. 109, 21 N.

E. 106; *Glass v. Glass*, 114 Mass. 563. See, also, similar statutes in *Dyer v. Brannock*, 66 Mo. 391; *Lincecum v. Lincecum*, 3 Mo. 441; *Watts v. Owens*, 62 Wis. 512; *Harris v. Harris*, 85 Ky. 49, 2 S. W. 549; *Hiram v. Pierce*, 45 Me. 367. These statutes being remedial may be applied retrospectively. *Brower v. Brower*, 1 Abb. Ap. 214; *Teter v. Teter*, 101 Ind. 129; *Stone v. Keeling*, 3 Hen. & M. 228.

<sup>4</sup> See statute in *Jackson v. Jackson*, 94 Cal. 446; *Charles v. Charles*, 41 Minn. 201, 42 N. W. 985; *Nesbit v. Nesbit*, 3 Dem. (N. Y.) 329; *Wyles v. Gibbs*, 1 Redf. 382.

<sup>5</sup> *Stuckey v. Mather*, 24 Hun, 461.

ginning. Marriages are voidable which are obtained with imperfect consent, as where there is fraud, error or duress, or the party is incapable of giving consent from want of age, or mental incapacity, or where one of the parties was impotent before marriage. At the common law the canonical disabilities, consanguinity, affinity and impotence, rendered the marriage voidable and not void. This is, however, modified by statutes declaring certain marriages void for consanguinity and affinity. Voidable marriages are, of course, good for every purpose until avoided; the children are legitimate;<sup>1</sup> the survivor is entitled to the rights of a husband or wife,<sup>2</sup> and the wife is entitled to dower.<sup>3</sup> During the existence of the voidable marriage neither party can marry again.<sup>4</sup>

**§ 570. Defenses to nullity suit.**—It is clear that some of the defenses which may be made to a suit for divorce have no application to nullity proceedings. Where a marriage is absolutely void by statute, or on account of a prior marriage undissolved, no defense will prevent a decree of nullity unless it be estoppel or unreasonable delay. The doctrines of connivance, collusion, condonation and recrimination are based upon violations of marital duties, and can have no application where the marriage relation does not exist. The void marriage imposed no duties and created no obligations except such as arise between strangers. A wife may have her marriage annulled on account of the impotence of the husband though she had committed adultery.<sup>5</sup> If the marriage is void the defense of recrimination is wholly immaterial.<sup>6</sup> The doctrine of condonation has no application; but where the marriage is voidable, relief may be refused where cohabitation commenced or continued under circum-

<sup>1</sup> Bury's Case, 5 Co. 98.

§ 603; Duress, § 623; Want of age,

<sup>2</sup> Elliot v. Gurr, 2 Phillim. 16.

§ 723; Insanity, § 670.

<sup>3</sup> 1 Black. Com. 434.

<sup>5</sup> M. v. D., 10 P. D. 75, 175; A. B.

<sup>4</sup> State v. Cone, 86 Wis. 498, 57 N. W. 50. See *contra*, *In re Eichoff*, 101 Cal. 600. For affirmance of voidable marriages, see Fraud,

v. C. B., 11 Scotch Sess. Cas. (4th Ser.) 1060; C. B. v. A. B., 12 Scotch Sess. Cas. (4th Ser.) 36.

<sup>6</sup> See § 435.

stances from which ratification may be inferred. The general doctrine of delay applies to proceedings to annul a marriage for impotence, though it seems that insincerity is not a defense.<sup>1</sup> Impotence or physical incapacity cannot be condoned, but the circumstances may show an unreasonable delay.<sup>2</sup>

**§ 571. Practice and procedure.**—The suit to annul a marriage is similar to the suit for divorce and requires no separate treatment, as distinctions have been noted in the general treatment of various subjects. The statutes have generally conferred jurisdiction upon the courts to annul marriages in certain cases, and authorized the same pleadings as in the divorce suit. The domicile of the parties must be adequate for the suit for divorce. The wife is entitled to temporary alimony in any proceeding in which a *de facto* marriage is alleged to be void.<sup>3</sup> The wife is not entitled to permanent alimony but to a restoration of property, or a gross sum in lieu of her property rights and her contributions to the common fund.<sup>4</sup>

<sup>1</sup> *M. v. D.*, 10 P. D. 75.

<sup>2</sup> See § 454, What offenses may be condoned. Also, *Ryder v. Ryder* (Vt.), 28 A. 1029.

<sup>3</sup> § 852.

<sup>4</sup> Allowance in restitution of property, §§ 960-966; Recovery of services, rents and profits, etc., on decree of nullity, § 1023.

## PRIOR MARRIAGE UNDISSOLVED.

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| § 575. In general.<br>576. General doctrine of this chapter.<br>577. When prior marriage is undissolved the second marriage is void.<br>578. When second marriage is voidable under statutes.<br>579. Void although divorce subsequently obtained.<br>580. Presumptions in favor of marriage.<br>581. Knowledge that disability has been removed.<br>582. Marriage before decree <i>nisi</i> is made absolute.<br>582a. Marriage during time for appeal. | § 583. Marriage after a decree <i>a mensa</i> .<br>584. Belief that prior marriage was dissolved by death.<br>585. Belief that prior marriage was dissolved by divorce.<br>586. Marriage after void decree of divorce.<br>587. Decree obtained by fraud.<br>588. Remarriage of guilty party.<br>589. Bigamy as a cause for divorce.<br>590. Effect of void marriage at the common law.<br>591. Void marriages under the civil law. |
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**§ 575. In general.**—At common law marriage is a union of the two sexes for life to the exclusion of all others. A person could not be a party to two valid co-existing marriages. While a lapse of time will raise a presumption of the death of the absent party, so long as both parties are living no length of separation can dissolve the union. The party who violated his marital obligations by entering into a void second marriage was guilty of the canonical offense of bigamy. Later, in the time of James I, the offense was made a felony, but the statute exempted from punishment for bigamy all persons who remarried during the life-time of the former spouse, after a decree of divorce, a sentence of nullity, or disaffirmance on reaching the age of consent, or where one party married after the other had remained away

for the period of seven years without being heard from.<sup>1</sup> Bigamy is punishable in nearly all the states by similar statutes containing similar exceptions. The common law was very harsh in dealing with innocent parties who had entered into void marriages believing that the prior marriage was dissolved. When the second marriage was annulled the innocent party was deprived of all property rights and the issue of the second marriage became illegitimate. The first marriage was regarded as of divine origin, and continued no matter how long the parties were separated. And if one of the parties to the first marriage had died in the meantime, the survivor could return and claim the rights of a surviving husband or wife. No estoppel, no laches, and no neglect of marital duties, however flagrant, could bar the right of the delinquent party to assert his or her rights. Much of this injustice is now prevented by declaring legitimate the children of void marriages; and in some states the prior undissolved marriage is held in abeyance until the second marriage is declared void in a proceeding to test its validity. It is an absolute necessity, for the protection of the public as well as the innocent parties, that second marriages, contracted under a mistake of law or of fact, should be left undisturbed after a reasonable lapse of time, especially where the parties to the second marriage have acted in good faith. Otherwise the second marriage is never secure, but is always open to attack whenever the other party is prompted by greed or enmity to assert his rights.<sup>2</sup>

**§ 576. General doctrine of this chapter.**—A marriage exists until it is dissolved by divorce or the death of one of the parties. During the existence of the first marriage neither of the parties can enter into a valid second marriage. If a party to a valid subsisting marriage enters into another marriage the second marriage is absolutely void and has no legal effect whatever. It is not merely voidable, but is an ab-

<sup>1</sup> Stat. 1 Jac. 1, ch. 11, 1604; allowed in an action to annul a marriage Queen v. Lumley, L. R. 1 C. C. 196. § 852.

<sup>2</sup> Temporary alimony may be al-

solute nullity, incapable of ratification.<sup>1</sup> A party to a valid and subsisting marriage is absolutely incapable at common law of effecting a valid marriage with a third person, and a second marriage, while the first marriage subsists, is a nullity, void *ab initio*.<sup>2</sup> Such is the general doctrine where there is a prior marriage undissolved. It will be necessary to examine the various applications of this doctrine and its collateral results.

**§ 577. When prior marriage is undissolved the second marriage is void.**—When a valid prior marriage is shown to have been in full force at the time the second marriage was entered into, this is sufficient proof that the second marriage is void.<sup>3</sup> It was once contended that such second marriage is voidable.<sup>4</sup> It was urged that a prior undissolved marriage did not render the second marriage *ipso facto* void, but voidable only; furnishing ground for a dissolution of the marriage, but not *per se* annulling it. But it was held that a valid prior marriage, when established, rendered void the second one. “A man having a wife in full life is utterly powerless to make a valid contract of marriage, and his attempt to do so is entirely nugatory.”<sup>5</sup> By the general concurrence of the authorities, the second marriage is not voidable, but absolutely void, without a decree declaring it

<sup>1</sup> Williamson *v.* Parisien, 1 Johns. Ch. 389; Miles *v.* Chilton, 1 Rob. Ec. 684; Bird *v.* Bird, 1 Lee, 621; Searle *v.* Price, 2 Hag. Con. 187; Young *v.* Naylor, 1 Hill, Eq. 383; Smith *v.* Smith, 1 Tex. 621; Cartwright *v.* McGowan, 121 Ill. 388; Kenley *v.* Kenley, 2 Yeates, 207; Heffner *v.* Heffner, 23 Pa. 104; Teft *v.* Teft, 35 Ind. 44; Donnelly *v.* Donnelly's Heirs, 8 B. Mon. 113; Spicer *v.* Spicer, 16 Abb. Pr. (N. S.) 112; S. *v.* Goodrich, 14 W. Va. 834; Lindsay *v.* Lindsay, 42 N. J. Eq. 150; Glass *v.* Glass, 114 Mass. 563; Smith *v.* Smith, 5 O. St. 32; Armory *v.* Armory, 6 Rob. (N. Y.) 514.

<sup>2</sup> Lady Madison's Case, 1 Hale, P. C. 693; Wightman *v.* Wightman, 4 Johns. Ch. 343; Hemming *v.* Price, 12 Mod. 432; Rex *v.* Pensom, 5 Car. & P. 412; Regina *v.* Brown, 1 Car. & K. 144; Riddleson *v.* Wogan, Cro. Eliz. 858; Smart *v.* Whaley, 6 Smedes & M. 308; Martin's Heirs *v.* Martin, 22 Ala. 86; Rawdon *v.* Rawdon, 28 Ala. 565; Gathings *v.* Williams, 5 Ired. Law, 487; *In re Shaak's Estate*, 4 Brewster, 305; Patterson *v.* Gaines, 6 How. 550; Drummond *v.* Irish, 52 Ia. 41.

<sup>3</sup> See *supra*, § 576.

<sup>4</sup> Heffner *v.* Heffner, 23 Pa. 104.

<sup>5</sup> Id.

so.<sup>1</sup> Therefore, the competent party to the second marriage may marry again without first obtaining a decree annulling the supposed marriage.<sup>2</sup>

**§ 578. When a second marriage is voidable under statutes.**—By statute in some states the void second marriage is valid until annulled by decree. Such statutes produce the anomalous result of two legal marriages of one person existing at the same time. In one case the first wife deserted the husband, settled in California and married there. The husband married again and died. In a settlement of his estate it was held the second wife was entitled to dower, as her marriage was valid until annulled by a court of competent jurisdiction, and is to be deemed valid until such decree is entered.<sup>3</sup> Under such statute the validity of the marriage cannot be tried in any collateral proceeding, but only in a direct proceeding to annul the marriage. A similar provision of the New York code declares that: "If any person whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the life-time of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority." The interpretation placed upon this statute is that the first marriage is suspended or placed in abeyance, and is not reinstated upon the return of the absentee; otherwise both marriages would be in force at the same time, and polygamy would be sanctioned. The first marriage is merely inchoate and without any effect until one of the three parties obtains a decree pronouncing the second marriage void.<sup>4</sup> For purposes of succession and administration the second

<sup>1</sup> *Strode v. Strode*, 3 Bush, 227; *Reeves v. Reeves*, 54 Ill. 332; *Teft v. Teft*, 35 Ind. 44; *Peet v. Peet*, 52 Mich. 464, and authorities cited in this chapter.

<sup>2</sup> *Charles v. Charles*, 41 Minn. 201, 42 N. W. 935.

<sup>3</sup> *Patterson v. Gaines*, 6 How. 550; *Gaines v. Relf*, 12 How. (U. S.) 472-593; *Queen v. Chadwick*, 11 Q. B.

<sup>4</sup> *Gall v. Gall*, 114 N. Y. 109; *Griffin v. Banks*, 24 How. 213.

marriage is valid until its invalidity is established.<sup>1</sup> The statute is thus construed to promote the best interests of the state; and the marriage may be held void if the moving party has not acted in good faith, but married without inquiry in regard to the absentee, or without an honest belief that the other party was dead.<sup>2</sup> The statute proceeds upon a presumption of death, and a party is not protected in marrying without due inquiry for the absentee.<sup>3</sup>

The provision of the California code is similar to that of New York. It provides that: (1) "A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning; (2) unless such former husband or wife was absent, and not known to such person to be living, for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal." It is held that the second marriage is not void, but voidable, if the husband had written several letters to the absent wife and to his friends, making inquiries about her, and he was informed and believed that she was dead.<sup>4</sup>

· **§ 579. Void although divorce subsequently obtained.**—A decree of divorce does not relate back to any particular time, but becomes operative only when rendered.<sup>5</sup> If for some reason the decree is not operative, although the court had in fact made some minutes directing a decree, the marriage is void and does not become valid by a subsequent de-

<sup>1</sup> *White v. Lowe*, 1 Redf. 376; *McCartee v. Camel*, 1 Barb. Ch. 455, *Spicer v. Spicer*, 16 Abb. Pr. (N. S.) 464.

<sup>2</sup> *Wyles v. Gibbs*, 1 Redf. 382. <sup>3</sup> *Valleau v. Valleau*, 6 Paige, 207.

<sup>2</sup> *Id.*; *Jones v. Zoller*, 32 Hun, 280; <sup>4</sup> *Jackson v. Jackson*, 94 Cal. 446. *Cropsey v. McKinney*, 30 Barb. 47; <sup>5</sup> *Alt v. Banholzer*, 39 Minn. 511.

cree.<sup>1</sup> A marriage where the decree of divorce was entered two hours after the marriage ceremony was performed was, however, held valid.<sup>2</sup> Generally the party who enters into a subsequent marriage, knowing that the other spouse is living and undivorced, is unable to procure a dissolution of the first marriage on account of the adultery committed in the meretricious marriage.<sup>3</sup> If he desires to maintain the second marriage he must wait until his real wife by the first marriage obtains a divorce from him and then have a new ceremony performed with his second wife. The mere fact that, after the void second marriage is entered into, the first marriage is dissolved will not render the second marriage valid.<sup>4</sup>

**§ 580. Presumptions in favor of marriage.**— While the parties to the void second marriage are living together their relation is meretricious and illicit, and the question arises, Can this marriage become valid by cohabitation after the first marriage is dissolved by divorce or by the death of the other party? It is clear that as the second marriage is void it cannot be ratified.<sup>5</sup> But if the parties discover that the first marriage was dissolved and continue to cohabit as husband and wife for years, the presumption would arise that a valid marriage took place after the first marriage was dissolved. This presumption is very strong where the parties entered into the marriage in good faith, believing that the

<sup>1</sup> S. v. Eaton, 85 Wis. 587, 55 N. W. 890; *In re Cook's Estate*, 83 Cal. 415, 23 P. 392; *Teter v. Teter*, 88 Ind. 494.

<sup>2</sup> *Merriam v. Wolcott*, 61 How. Pr. 377, 393. In this case the parties acted in good faith believing that a divorce had been granted. The law would presume the decree to date from the opening of court on that day, and would disregard fractions of a day, except in cases of necessity to guard against injustice.

<sup>3</sup> See *Whippen v. Whippen*, 147 Mass. 294.

<sup>4</sup> *In re McLaughlins*, 4 Wash. 570, 30 P. 651; *Harris v. Harris*, 85 Ky. 49, 2 S. W. 549; *Williams v. Williams*, 63 Wis. 58; *Teter v. Teter*, 88 Ind. 494 and 101 Ind. 129; *Hunt's Appeal*, 86 Pa. 294.

<sup>5</sup> *Tyler on Infancy & Cov.* 833; *Holabird v. Atlanta, etc. Ins. Co.*, 12 Am. L. Reg. 566; *Thompson v. Thompson*, 114 Mass. 566.

first marriage was dissolved, and after discovering the mistake continued to cohabit as husband and wife, acknowledging their child as legitimate, and by every act and declaration showing their belief that they were legally married after the first marriage was dissolved. To overcome this presumption of a valid marriage after the first is dissolved, it would be necessary to prove a negative,—to prove that at no time after the dissolution of the first marriage had the parties entered into a valid marriage. This would be most difficult to prove, especially where a common-law marriage is held sufficient. But this difficulty of proof is not unusual in such cases, since it is the rule that *all presumptions shall be made in favor of marriage where matrimony was the desire of the parties.* In conformity with all the presumptions in favor of marriage, the true doctrine is believed to be that a valid marriage will be presumed if the parties continue to cohabit as husband and wife after the disability is removed. Where a common-law marriage is valid, a marriage will be presumed if the parties to the void marriage live together, as husband and wife, but a short time after death or divorce has dissolved the first marriage, and it will be necessary for the impeaching party to show that the parties, after removal of the disability, had no desire to continue the marital relation and did not subsequently agree to be married.<sup>1</sup> Under such circumstances a marriage will be presumed, although a formal marriage is required, and a marriage good at common law is not sufficient. The presumption exists whatever the form of marriage required. In such case the

<sup>1</sup> Teter *v.* Teter, 101 Ind. 129; Atty. Gen., 1 Ap. Cas. 686; Harvey Teter *v.* Teter, 88 Ind. 494; Boulden *v.* Carrol, 5 Tex. Civ. Ap. 324, 23 v. McIntire, 119 Ind. 574, 21 N. E. S. W. 713; Blanchard *v.* Lambert, 445; Cartwright *v.* McGown, 121 43 Ia. 228; Harbeck *v.* Harbeck, 102 Ill. 388; Adams *v.* Adams, 57 Miss. N. Y. 714; Campbell *v.* Campbell, 267; State *v.* Worthingham, 23 1 H. L. Sc. 182-215; Lapsley *v.* Minn. 528; Schmisseur *v.* Beatrie, Grierson, 1 H. L. Cas. 498; De 147 Ill. 210, 35 N. E. 525; Fenton *v.* Thoren *v.* Wall, 3 Scotch Sess. Cas. Reed, 4 Johnson, 52; Rose *v.* Clark, (4th Ser.) H. L. 28.  
8 Paige, Ch. 574; De Thoren *v.*

presumption will be that the marriage was in conformity to the law. But this is denied in some of the states where common-law marriages are not valid; the presumption being that an illicit cohabitation continued unless a ceremony was shown.<sup>1</sup>

There may also be a presumption of divorce where the parties, or one of them, has, after a separation, married again.<sup>2</sup> Where the validity of a second marriage is questioned, and the impeaching party proves a prior marriage, it will be presumed that such marriage has been dissolved by divorce and the second marriage is therefore valid.<sup>3</sup> The burden of proof is on the impeaching party to show that the absent spouse was living when the second marriage was entered into, or that the divorce was not rendered before such second marriage, and also that the parties did not marry after removal of the disability.<sup>4</sup> This presumption of divorce may be overcome by proof that no divorce could be obtained in the state where the parties resided,<sup>5</sup> or by proof that no divorce was granted in the county where both parties re-

<sup>1</sup> *Harris v. Harris*, 85 Ky. 49, 2 S. W. 549; *In re McLaughlin*, 4 Wash. 570, 30 P. 651; *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445; *Randlett v. Rice*, 141 Mass. 385; *Spencer v. Pollock*, 83 Wis. 215.

<sup>2</sup> *Blanchard v. Lambert*, 43 Ia. 228; *Ellis v. Ellis*, 58 Ia. 720; *Carroll v. Carroll*, 20 Tex. 731.

<sup>3</sup> *Johnson v. Johnson*, 114 Ill. 611; *Coal Run Co. v. Jones*, 127 Ill. 374; *Com. v. Belgard*, 5 Gray, 95. Where the records had been destroyed by fire and the parties married others, it will be presumed that a valid divorce was granted, and the decree was entered of record. *In re Edwards*, 58 Ia. 431. In an action for divorce the husband alleged as a defense "that at the time of the

pretended marriage of complainant with the defendant, the complainant was a married woman and was then and there the wife of — —, who was then and there alive." The only evidence that the husband was alive at that time was the testimony of the wife that six years before her second marriage she heard that her husband had married again. *Held*, that the dissolution of the first marriage by death or divorce would be presumed under the circumstances. *Johnson v. Johnson*, 114 Ill. 611.

<sup>4</sup> *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445.

<sup>5</sup> *McCarty v. McCarty*, 2 Strob. 6, 47 Am. D. 585.

sided,<sup>1</sup> or by the admission of the survivor that neither party obtained a divorce or believed that a divorce had been obtained.<sup>2</sup>

**§ 581. Knowledge that disability has been removed.**—If the parties knowingly enter into an illicit cohabitation and continue it without knowledge that the disability has been removed, it is clear that there is no presumption of marriage after the parties become competent. Or if the parties suppose the marriage is valid and continue what they believe to be a lawful union, and are never aware that their marriage is void, it is folly to presume a new marriage. Their condition is most unfortunate. To treat their marriage as void, to deprive them of the right of dower or courtesy, and to declare innocent children to be bastards, is certainly demanding a great and useless sacrifice to modern idolatry of the marriage relation. But their pitiable condition is the result of legal doctrines so firmly established that the only means of escape is by some statutory enactment incorporating into our law the rule of the civil law that a putative marriage is converted into a real one by the removal of the disability by death or divorce.

If one of the parties is ignorant of any impediment to the marriage and dies believing the marriage is legal, no subsequent marriage could be presumed, because the parties are acting under a belief that their marriage was valid, and all their conduct would be interpreted with reference to the second marriage.<sup>3</sup> This is well illustrated by an Illinois case where a man, whose wife was living, married another woman during the existence of the first marriage. Three years afterward, without his knowledge, the first wife obtained a divorce, but it does not appear that the second wife had any knowledge of this proceeding. The parties to the second marriage during their life-time treated their marriage as valid and evidently believed it to be so. Four children

<sup>1</sup> Barnes *v.* Barnes (Ia.), 57 N. W. 851.      <sup>3</sup> Randlett *v.* Rice, 141 Mass. 385.

<sup>2</sup> Ellis *v.* Ellis, 58 Ia. 720.

were born to them and were recognized as legitimate. After the death of both parties the validity of the marriage was questioned in an action for the partition of the husband's lands, brought by his brothers and sisters against the heirs of a child of the second marriage. On these facts the question arose whether a new marriage would be presumed from long cohabitation and repute. Speaking of the wife, who was ignorant of a prior marriage, it was said: "She was deceived and imposed upon by Lewis, in his falsely assuming to have capacity to marry her, and in concealing the fact of his prior marriage to a then living and undivorced wife. Not knowing of the former marriage she could have had no reason for desiring a second marriage. If she regarded herself as the lawful wife of Lewis, it would be a violent presumption to hold that she had assented to a second informal marriage."<sup>1</sup> As every reasonable and fair presumption will be indulged in to uphold a marriage and establish the legitimacy of children, it will be presumed that the wife had knowledge of the divorce, and that, after such fact was known, the parties consented to marry each other and thus formed a common-law marriage. In the last cases cited the presumption is rebutted by satisfactory evidence.<sup>2</sup>

**§ 582. Marriage before decree nisi is made absolute.—** Although a decree *nisi* has been entered, the marriage exists until such decree is made absolute. A second marriage during the existence of the decree *nisi*, and before it is made absolute, is void.<sup>3</sup> If a party marries again, supposing he was at liberty to do so under such decree, he has made a mistake of law and not of fact, and the court will refuse to

<sup>1</sup> *Cartwright v. McGowan*, 121 Ill. 388. Followed by *Voorhees v. Voorhees*, 46 N. J. Eq. 411. *Cook v. Cook*, 144 Mass. 163, 10 N. E. 749; *Googins v. Googins*, 152 Mass. 533, 25 N. E. 833; *Graves v. Graves*, 108 Mass. 314; *Edgerly v. Edgerly*, 112 Mass. 53; *Sparhawk v. Sparhawk*, 114 Mass. 355; *Warter v. Warter*, 15 P. D. 152; *Wickham v. Wickham*, 6 P. D. 11.

<sup>2</sup> But see cases cited in § 580, holding that the party impeaching the marriage must negative the presumption of a valid marriage after removal of the disability.

<sup>3</sup> *Moors v. Moors*, 121 Mass. 232;

make the decree absolute.<sup>1</sup> But if he waits the time required by law, believing and having reason to believe that he has obtained a decree absolute, and, being guilty of no negligence, marries again and cohabits with the person he marries, he is not prevented from having the decree made absolute.<sup>2</sup> The marriage under the decree *nisi* being void a new ceremony would be necessary, unless the decree absolute dated from the entry of decree *nisi*.<sup>3</sup>

**§ 582a. Marriage during time for appeal.**—It is provided in many states that the divorced parties may not marry until after the expiration of the time for appeal, or until six months after the decree of divorce is entered. If such provision is penal, a marriage within the prohibited time will be valid, but the parties will be subject to a prosecution for the offense. Such marriage will not be void unless the statute expressly declares it to be so.<sup>4</sup> If it is penal it has no extraterritorial effect, and the parties may avoid the statute by a marriage in another state. It is held in England that such statute makes the decree inoperative until the six months have expired, and that the decree is in effect a decree *nisi*, and a marriage within the prohibited time is void. Accordingly, it is held that a marriage in England is void if at the time the decree in India had not become operative.<sup>5</sup> The statutes of our states are similar in form and effect to statutes prohibiting the remarriage of the guilty party, and will receive the same construction.<sup>6</sup>

<sup>1</sup> *Moors v. Moors*, 121 Mass. 232.

<sup>2</sup> *Pratt v. Pratt*, 157 Mass. 403, 32 N. E. 747.

<sup>3</sup> *Prole v. Soady*, 3 Ch. Ap. 220; *Norman v. Villars*, 2 Ex. Div. 359; *Noble v. Noble*, 1 P. D. 691; *Wales v. Wales*, 119 Mass. 89.

<sup>4</sup> See § 588.

<sup>5</sup> *Warter v. Warter*, 15 P. D. 152.

<sup>6</sup> See § 588 on this point.

The code of Oregon provides that "a decree declaring a marriage void or dissolved at the suit

or claim of either party shall have the effect to terminate such marriage as to both parties, except that neither party shall be capable of contracting marriage with a third person; and if he or she does so contract, shall be liable therefor as if such decree had not been given, until the suit has been heard and determined on appeal; and if no appeal be taken, the expiration of the period allowed by this code to take such appeal." The wife, a

**§ 583. Marriage after a decree a mensa.**—A decree *a mensa* does not destroy the marriage relation or dissolve it, but merely suspends some of the marital obligations.<sup>1</sup> A second marriage after such a decree is clearly void.<sup>2</sup> When the second marriage is discovered to be void for this reason, either party to such marriage can have it annulled. But if the parties desire to have their illicit relation converted to the *status* of a valid marriage, they must have the first marriage dissolved and have a new ceremony performed after

resident of Oregon, married in that state before the decree became operative under this statute. In a suit for alimony against her second husband, it was held that such marriage was void, although the statute did not declare it to be so. *Wilhite v. Wilhite*, 41 Kan. 154.

The code of Washington declares that “neither party shall be capable of contracting marriage with a third person until the period in which an appeal may be taken under the provisions of the civil practice act has expired; and, in case an appeal is taken, then neither party shall intermarry with a third person until the cause has been fully determined.” The plaintiff obtained a divorce and married in Washington within six months. The parties cohabited as husband and wife until the death of one of the husbands. No appeal was taken, and no marriage was solemnized after the time for appeal had expired. On a petition of the first wife for letters of administration, the second marriage was held void under the statute cited. *In re Smith's Estate*, 4 Wash. 702, 30 P. 1059.

A marriage to the defendant

within four months after the rendition of a decree is void, where the statute declares that a decree of divorce “shall not operate so as to release the offending party, who shall, nevertheless, remain subject to the pains and penalties which the law prescribes against a marriage whilst a former husband or wife is living.” *Cox v. Combs*, 8 B. Mon. 231.

**Marriage after ex parte divorce.**—In *Comstock v. Adams*, 23 Kan. 513, the parties were married six days after a decree of divorce was obtained on service by publication. The parties to the divorce suit entered into a contract, in which the defendant agreed, in consideration of a certain sum, to take no steps or proceedings, or to institute any proceedings to invalidate, set aside or annul the divorce granted. On a failure to pay the consideration, the defendant had the decree vacated. After the death of the husband, the first wife brought an action to set aside his will, and it was held that the second marriage was void.

<sup>1</sup> *Barker v. Barker*, 2 Pin. 297.

<sup>2</sup> *Young v. Naylor*, 1 Hill, Eq. (S.C.) 383; *Carmena v. Blaney*, 16 La.

the divorce is obtained. The divorce cannot be obtained by the incapable party, for by entering into a void marriage he or she has committed adultery, unless such marriage was entered into by mistake of fact. This adultery can be set up as recrimination and defeat the suit for divorce unless the recrimination is only a bar at discretion of the court. In such case the court will not refuse a divorce where the adultery of the plaintiff in entering the void marriage is only technical and was committed under a mistake of law or fact. The party to the first marriage who has not entered into a void marriage may obtain a divorce on account of adultery or bigamy.

**§ 584. Belief that prior marriage was dissolved by death.**— Since a marriage exists until dissolved by death or divorce, it continues as long as the absentee lives, no matter how long he may remain away. A second marriage is therefore absolutely void, and cannot be affirmed if the absentee is still living.<sup>3</sup> The belief of both parties, or of one of them, that the prior marriage was dissolved by the death of the absentee, or because he has been absent for more than seven years, may be a defense in a criminal proceeding for bigamy, but does not render the second marriage valid.<sup>4</sup> But in many of the states the statutes provide that the issue of the second marriage shall be legitimate if the second marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead.<sup>5</sup>

**§ 585. Belief that prior marriage was dissolved by divorce.**— The belief that a prior marriage was dissolved by divorce may be a mistake of fact or of law according to the

An. 245; *Thompson v. Thompson*, 10 Philadelphia, 131.

<sup>3</sup> *James v. James*, 5 Blackford (Ind.), 141; *Kenley v. Kenley*, 2 Yeates (Pa.), 207; *Martin v. Martin*, 22 Ala. 86; *Zule v. Zule*, 1 N. J. Eq. 96; *Williamson v. Parisien*, 1 Johns. Ch. 388; *Glass v. Glass*, 114 Mass. 563.

<sup>4</sup> *Pain v. Pain*, 37 Mo. Ap. 110; *Thomas v. Thomas*, 124 Pa. 646, 17 A. 182; *Glass v. Glass*, 114 Mass. 563; *Valleau v. Valleau*, 6 Paige, 207; *Oram v. Oram*, 3 Redf. 300.

<sup>5</sup> *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106; *Glass v. Glass*, 114 Mass. 563.

circumstances. If it is a mistake as to the effect of a decree *nisi* or *a mensa* it is clearly a mistake of law.<sup>1</sup> But if the mistake is in regard to the entry or existence of a decree it is a mistake of fact.<sup>2</sup> The belief that one of the parties is divorced may be a material fact where the statute provides that children of parties married in good faith shall be legitimate.<sup>3</sup> But otherwise such belief is immaterial, as such marriage, like the marriage under the belief that a former husband and wife is dead, noticed in the previous section, is void and not voidable.<sup>4</sup> Such a marriage is void although the statute declare the children legitimate "when either party to a marriage, void because a former marriage exists undissolved, shall have contracted such void marriage in the reasonable belief that such disability did not exist." Such provision relates to the legitimacy of the children and not to the validity of the marriage.<sup>5</sup> Where the second marriage has been contracted under such belief, the marriage is void, and a decree annulling the marriage is not necessary, and the competent party may enter into a valid marriage without such decree.<sup>6</sup> But the wisest course is to have such marriage annulled during the life-time of the parties.<sup>7</sup>

**§ 586. Marriage after void decree of divorce.**—According to familiar principles of law, a judgment or decree of a court without jurisdiction is a mere nullity. A decree of divorce, void for want of jurisdiction, is without any legal effect and does not dissolve the marriage. A decree is void for want of jurisdiction if the plaintiff did not have a *bona fide* domicile within the state.<sup>8</sup> The invalidity of such de-

<sup>1</sup> *Moors v. Moors*, 121 Mass. 232; *White v. White*, 105 Mass. 325; *Glass v. Glass*, 114 Mass. 563.

<sup>2</sup> *Pratt v. Pratt*, 157 Mass. 503.

<sup>3</sup> See § 584.

<sup>4</sup> *Brown v. Brown*, 142 Ill. 409; *Gordon v. Gordon*, 141 Ill. 160; *Cartwright v. McGowan*, 121 Ill. 388.

<sup>5</sup> *Teter v. Teter*, 88 Ind. 494.

<sup>6</sup> *Reeves v. Reeves*, 54 Ill. 382; *Martin v. Martin*, 22 Ala. 86; *Gaines v. Relf*, 12 How. (U. S.) 472; *Williams v. Williams*, 63 Wis. 58; *Lincoln v. Lincoln*, 6 Rob. 525.

<sup>7</sup> *Appleton v. Warner*, 51 Barb. (N. Y.) 270; *Teft v. Teft*, 35 Ind. 44.

<sup>8</sup> *Dutcher v. Dutcher*, 39 Wis.

cree may be shown in a proceeding in any state and between any parties wherever the issue may arise.<sup>1</sup> As, where the applicant removed from his own state to Utah, and procured a divorce under a statute authorizing the courts of the territory to take jurisdiction of divorce cases "where the applicant wished to become a resident." Such decrees are uniformly held to be void and do not dissolve the marriage. Subsequent marriages are void and bigamous.<sup>2</sup> According to the peculiar doctrine of jurisdiction and domicile which prevails in New York, a valid divorce may be obtained by substituted service upon a non-resident if his domicile is in fact within the state.<sup>3</sup> But it is denied that the marital relation is a *res* within the state of the party invoking the

651; *Jackson v. Jackson*, 1 Johns. man *v. Hoffman*, 46 N. Y. 30; 424; *Yates v. Yates*, 2 Beasley, 280; *House v. House*, 25 Ga. 473; *Leith v. Leith*, 39 N. H. 20; *Strait v. Strait*, 3 MacAr. 415; *Gregory v. Gregory*, 78 Me. 187; *Ditson v. Ditson*, 4 R. I. 87; *Pawling v. Willson*, 13 Johns. 192; *Barber v. Root*, 10 Mass. 260; *Neff v. Beauchamp*, 74 Ia. 92, 36 N. W. 905; *Bradshaw v. Heath*, 13 Wend. 407; *Watkins v. Watkins*, 135 Mass. 83; *Sewall v. Sewall*, 122 Mass. 156; *Van Fossen v. S.*, 37 O. St. 317; *Gettys v. Gettys*, 3 Lea, 260; *Shannon v. Shannon*, 4 Allen, 134; *Shaw v. Gould*, L. R. 3 H. L. 55; *Shaw v. Atty.-Gen.*, 2 P. & M. 156; *Kerr v. Kerr*, 41 N. Y. 272; *White v. White*, 5 N. H. 476; *Harrison v. Harrison*, 20 Ala. 629; *Hare v. Hare*, 10 Tex. 355; *Vischer v. Vischer*, 12 Barb. 640; *Coddington v. Coddington*, 20 N. J. Eq. 263; *Weatherbee v. Weatherbee*, 20 Wis. 499.

<sup>1</sup> See cases in last note. *People v. Dawell*, 25 Mich. 247; *Smith v. Smith*, 13 Gray, 209; *Sewall v. Sewall*, 122 Mass. 156; *Hoff-*

*man v. Hoffman*, 46 N. Y. 30; *Platt's Appeal*, 80 Pa. 501; *Cavanaugh v. Smith*, 84 Ind. 380; *Doughty v. Doughty*, 28 N. J. Eq. 581; *Adams v. Adams*, 154 Mass. 290, 28 N. E. 260; *Larimore v. Knoyle*, 43 Kan. 338, 23 P. 487; *St. Sure v. Lindsfelt*, 82 Wis. 346, 52 N. W. 308; *Smith v. Smith*, 43 La. An. 1140, 10 So. 248; *Van Orsdal v. Van Orsdal*, 67 Ia. 35, 24 N. W. 579; *Regina v. Wright*, 1 P. & B. (New Brunswick), 363; *Neff v. Beauchamp*, 74 Ia. 92, 36 N. W. 905; *Gettys v. Gettys*, 71 Tenn. 260; *Munson v. Munson*, 14 N. Y. Supp. 692; *Chaney v. Bryan*, 83 Tenn. 589. But see *Reed v. Reed*, 52 Mich. 117; *Waldo v. Waldo*, 52 Mich. 94.

<sup>2</sup> *Litowich v. Litowich*, 19 Kan. 451, 27 Am. R. 145; *Hood v. S.*, 56 Ind. 263; *S. v. Armington*, 25 Minn. 29; *Folger v. Columbia Ins. Co.*, 99 Mass. 267; *Smith v. Smith*, 19 Neb. 706, 28 N. W. 296; *Cost v. Cost*, 1 Utah, 112; *S. v. Fleak*, 54 Ia. 429; *Davis v. Com.*, 13 Bush, 318; *Hardy v. Smith*, 136 Mass. 328.

<sup>3</sup> *Hunt v. Hunt*, 72 N. Y. 217.

jurisdiction of the court to dissolve it. A decree of divorce obtained in another state by substituted service, although valid in all other states, is held void in New York as against a citizen of that state who was not personally served with summons and did not appear in the proceedings. The *status* of such citizen is not affected by the decree, he or she remaining a married person.<sup>1</sup> Thus, where the wife obtained a decree of divorce in Ohio against her husband, who was a citizen of New York, it was held that such decree did not affect the *status* of the husband. He committed bigamy by entering into a second marriage.<sup>2</sup> A second marriage performed in New York, after such decree of divorce, is void.<sup>3</sup> And, since the validity of a marriage is to be determined by the law of the state where it was entered into, such marriage is void everywhere.<sup>4</sup> It has been admitted, however, that a decree of divorce was valid where the parties married and resided in Ohio, and the husband obtained a divorce on account of the wife's adultery committed in that state, although the wife had, after their separation, removed to New York, and notice was served by publication.<sup>5</sup>

A marriage of one of the parties supposed to be divorced by a decree which is void for want of jurisdiction, or for fraud in obtaining or proving jurisdiction, is absolutely void. No subsequent conduct of the parties can render such void decree valid. The innocent party, who had no notice of the

<sup>1</sup> *Rigney v. Rigney*, 127 N. Y. 408, Supp. 191; *In re House Estate*, 14 N. Y. Supp. 275; *Scragg v. Scragg*, 18 N. Y. Supp. 487. See, also, *Cook v. Cook*, 56 Wis. 195, 14 N. W. 33; *Doughty v. Doughty*, 28 N. J. Eq. 581; *Flower v. Flower*, 42 N. J. Eq. 152, 7 A. 669; *Simonds v. Allen*, 33 Ill. Ap. 512.

<sup>2</sup> *People v. Baker*, 76 N. Y. 78.

<sup>3</sup> *O'Dea v. O'Dea*, 101 N. Y. 23.

<sup>4</sup> *Simonds v. Allen*, 33 Ill. Ap. 512.

<sup>5</sup> *Matter of Morrison*, 52 Hun, 102.

divorce proceedings, is not estopped to assert its invalidity because she has herself relied upon the decree and married another.<sup>1</sup> The fact that a mother is willing to have the child of the second marriage declared a bastard in order to recover dower, while extremely reprehensible, cannot be considered as in any way rendering the void decree operative. Nor can the party who practiced the fraud upon the court by making a false showing of jurisdiction prevent the vacation of the decree by entering into a second marriage before such void decree is vacated.<sup>2</sup> The doctrines of delay and estoppel may prevent either party from asserting property rights under such circumstances.<sup>3</sup> A void decree will be set aside although an innocent party relied upon it and married one of the divorced parties and children were born of such marriage.<sup>4</sup> When this question was first decided it was admitted that "it may seem an arbitrary act to expunge a sentence of divorce with a stroke of a pen, bastardize after-begotten children, involve an innocent third person in legal guilt, and destroy rights acquired in reliance on a judicial act which was operative at the time. But the legitimate husband has also his rights; and, if any one must suffer from the invalid marriage, it is he who procured it."<sup>5</sup> The *status* of the second wife is no more deplorable than that of any innocent woman who marries a man having a wife living

<sup>1</sup> Rundle *v.* Van Inwegan, 9 Civil Pro. 328.

<sup>2</sup> Brotherton *v.* Brotherton, 12 Neb. 72. See, also, § 1053.

<sup>3</sup> See Estoppel, § 556.

<sup>4</sup> Allen *v.* McClellan, 12 Pa. St. 328 (1849); Everett *v.* Everett, 60 Wis. 200; Edson *v.* Edson, 108 Mass. 590; Smith *v.* Smith, 20 Mo. 166; Caswell *v.* Caswell, 120 Ill. 377, 11 N. E. 342; Scanlon *v.* Scanlon, 41 Ill. Ap. 449; Holmes *v.* Holmes, 63 Me. 420; True *v.* True, 6 Minn. 315; Bomsta *v.* Johnson, 88 Minn. 230, 36 N. W. 341; Wisdom *v.* Wisdom,

24 Neb. 551, 39 N. W. 594; Brotherton *v.* Brotherton, 12 Neb. 72; Wortman *v.* Wortman, 17 Ab. Pr. (N. Y.) 66; Comstock *v.* Adams, 23 Kan. 513; Rush *v.* Rush, 46 Ia. 648, 48 Ia. 701; Lawrence *v.* Lawrence, 73 Ill. 557; Stephens *v.* Stephens, 62 Tex. 337; Whitcomb *v.* Whitcomb, 46 Ia. 437; Boyd's Appeal, 38 Pa. 241; Crouch *v.* Crouch, 30 Wis. 667; Weatherbee *v.* Weatherbee, 20 Wis. 499.

<sup>5</sup> Allen *v.* McClellan, 12 Pa. St. 328.

and undivorced. It is to be regretted that the disgrace and trouble cannot be visited upon the head of the wrong-doer alone, but it often happens innocent parties must suffer with the guilty. Considerations of public policy as well as justice demand that fraud practiced upon a court shall not be successful. It is of the highest importance that all should understand that a decree obtained by fraud will be set aside when the facts are proven. Were it otherwise, a reckless man, by imposing upon the court, might relieve himself of supporting his wife, cut off her right of dower, obtain custody of the children and "stamp her name with unmerited disgrace," and preclude her from all relief by committing the additional wrong of marrying another.

**§ 587. Decree obtained by fraud.**—A distinction should be made between a decree void for want of jurisdiction and a decree obtained by false evidence as to the cause for divorce. If a decree of divorce is void for want of jurisdiction, no estoppel or long acquiescence will prevent a party from having it set aside. The fact that the moving party has relied on the divorce as a dissolution of the marriage and has married again will not estop her from showing that such decree is void for want of jurisdiction.<sup>1</sup> A fraudulent showing of jurisdiction will render the decree absolutely void, but a fraud practiced upon the court in giving false evidence, or in misleading the defendant as to the cause for divorce, or suppressing the evidence, or procuring a decree by collusion, will render the decree voidable only. This distinction is carefully noted in the opinions.<sup>2</sup> Thus, where the court had jurisdiction of the parties, and the fraud was practiced in procuring the decree, it will not be set aside if the moving party has been guilty of acquiescence or unreasonable delay after the discovery of the fraud.<sup>3</sup> The statute of lim-

<sup>1</sup> *Rundle v. Van Inwegan*, 9 Civil Pro. R. 328. See, also, § 1053.

<sup>2</sup> *Everett v. Everett*, 60 Wis. 200; *Edson v. Edson*, 108 Mass. 590; *Caswell v. Caswell*, 120 Ill. 377.

<sup>3</sup> *Sedlak v. Sedlak*, 14 Or. 540, 13 P. 452; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Richardson's Ap.*, 132 Pa. 292, 19 A. 82; *Singer v. Singer*, 41 Barb. 139; *Miltmore v. Miltmore*,

itations is applicable to such cases, but does not begin to run until the discovery of the fraud.<sup>1</sup> Especially is this true when an innocent party has married one of the divorced parties relying upon such decree.<sup>2</sup> Under such circumstances the courts may rightly refuse to disturb the rights of innocent parties by declaring the marriage void and thus bastardizing innocent children, where the motive of the moving party is to gratify personal feeling and recover alimony.<sup>3</sup> Nor should the divorce be set aside on the ground of public morals if the moving party is actuated solely by mercenary motives.<sup>4</sup>

**§ 588. Remarriage of guilty party.**—The marriage is completely dissolved by a decree of divorce, and all the obligations created by that relation are discharged, and the parties stand as though no such relation had existed. The marriage relation is as completely dissolved by divorce as by death. Therefore on the entry of a decree of divorce both parties are entitled to marry again, unless the statutes expressly prohibit the guilty party from marrying again.<sup>5</sup> The New York code<sup>6</sup> provides that “Where a marriage is dissolved, as prescribed in this article, the plaintiff may marry again, during the life-time of the defendant; but a defendant, adjudged to be guilty of adultery, shall not marry again until the death of the plaintiff.” But this section does not prevent the remarriage of the parties to the action.<sup>7</sup> If the guilty party marries again in the state during the

40 Pa. 151; *Garner v. Garner*, 38 Ind. 139; *Stephens v. Stephens*, 51 Ind. 542; *Bourn v. Simpson*, 9 B. Mon. 454; *Jordon v. Van Epps*, 58 How. Pr. 338; *Nicholson v. Nicholson*, 113 Ind. 131, 15 N.E. 223; *Brown v. Grove*, 116 Ind. 84, 18 N.E. 387; *Jones v. Jones*, 78 Wis. 446, 47 N.W. 728; *Thompson v. Thompson*, 91 Ala. 591; *Zoellner v. Zoellner*, 46 Mich. 511; *Danforth v. Danforth*, 105 Ill. 603.

*Larimore v. Knoyle*, 43 Kan. 338, 23 P. 487.

<sup>2</sup> *Singer v. Singer*, 41 Barb. 139; *Nichols v. Nichols*, 25 N.J. Eq. 60; *Earle v. Earle*, 91 Ind. 27; *Yorston v. Yorston*, 32 N.J. Eq. 495.

<sup>3</sup> *Id.*

<sup>4</sup> *Hubbard v. Hubbard*, 19 Colo. 13, 34 P. 170.

<sup>5</sup> *Barber v. Barber*, 16 Cal. 378.

<sup>6</sup> § 1761.

<sup>7</sup> See construction of this section in *Peck v. Peck*, 8 Abb. N.C. 400;

<sup>1</sup> *Caswell v. Caswell*, 120 Ill. 377;

life of the complainant he is guilty of bigamy.<sup>1</sup> Generally the remarriage is prohibited within a specified period; as, five years.<sup>2</sup> In some states until the further order of the court.<sup>3</sup> The guilty party is, by some statutes, allowed to remarry upon showing good behavior and obtaining permission of the court.<sup>4</sup> Such permission must be first obtained or the second marriage will be void.<sup>5</sup> It is held that these statutes are not void as being in restraint of marriage and therefore contrary to public policy,<sup>6</sup> and, though retrospective, are not void as being *ex post facto* laws.<sup>7</sup>

The evident intent of these statutes is to prevent the guilty party from entering into another marriage. He having been unfaithful to the obligations of the first marriage, it is presumed that he is unfit to enter into a second marriage unless he reforms. But such prohibition is in fact a restraint of marriage. It leaves at large a person who, by false representations, may induce an unsuspecting woman to enter into a void marriage; or if this does not occur, the unfortunate defendant, who cannot marry, is tempted to continued adulteries without incentive to reformation. A prohibition which restrains marriage, encourages adultery, leaves the party in a position to contract void marriages, and takes away a natural incentive to reformation, should be held contrary to public policy. These considerations are sufficient to justify the repeal of such statutes.<sup>8</sup> The prohi-

Moore *v.* Moore, 8 Abb. N. C. 171; Cox *v.* Combs, 8 B. Mon. 231; Thompson *v.* Colvin, 2 Paige, 385; Green's Case, 8 Abb. N. C. 450; Peugnet *v.* Phelps, 48 Barb. 566.

It is held that a marriage with the guilty party is valid where both parties were not residents of the state of New York at the time the marriage was entered into. Succession of Hernandez (La.), 15 So. 461.

<sup>1</sup> P. *v.* Taber, 92 N. Y. 146, overruling P. *v.* Hovey, 5 Barb. 117.

<sup>2</sup> Peck *v.* Peck, 8 Abb. N. C. 400;

Cox *v.* Combs, 8 B. Mon. 231; Thompson *v.* Colvin, 114 Mass. 566.

<sup>3</sup> Musick *v.* Musick, 88 Va. 12, 13 S. E. 302.

<sup>4</sup> Sparhawk *v.* Sparhawk, 114 Mass. 355; Peck *v.* Peck, 8 Abb. N. C. 400; Morgan *v.* Morgan, 1 P. & M. 644; Cochrane's Petition, 92 Mass. 276; Childs' Case, 109 Mass. 406.

<sup>5</sup> Thompson *v.* Thompson, 114 Mass. 566.

<sup>6</sup> Owen *v.* Brackett, 75 Tenn. 448.

<sup>7</sup> Elliott *v.* Elliott, 38 Md. 357.

<sup>8</sup> Statutory prohibition of remar-

bition applies only to the parties who have been found guilty by a decree rendered in the state, and has no reference to a decree granted in another state.<sup>1</sup> The authorities are almost uniform that such statutes, being penal, have no extraterritorial operation, and unless there is an express provision making a marriage entered into in another state void, the guilty party may contract a valid marriage in another state, even though both parties are residents of the state where the decree was rendered, and went out of the state to evade its laws.<sup>2</sup>

riage has been repealed in Maine and Massachusetts.

<sup>1</sup> *Phillips v. Madrid*, 83 Me. 205, 22 A. 214; *Bullock v. Bullock*, 122 Mass. 3.

<sup>2</sup> *Van Voorhis v. Brintnall*, 86 N. Y. 18, overruling *Thorp v. Thorp*, 47 Sup. Ct. 80, and *Marshall v. Marshall*, 2 Hun, 238; s. c., 48 Barb. 57. See other authorities in this state, *Thorp v. Thorp*, 90 N. Y. 605; *Miller v. Miller*, 91 N. Y. 321; *Moore v. Hegeman*, 92 N. Y. 521. See, also, *Ponsford v. Johnson*, 2 Blatchford, 51.

See, also, *Fuller v. Fuller*, 40 Ala. 301; *Dickson v. Dickson*, 1 Yerg. (Tenn.) 110; *Cox v. Combs*, 8 B. Mon. 231; *Wilson v. Holt*, 83 Ala. 528, 3 So. 321; *Com. v. Lane*, 113 Mass. 458; *Van Storch v. Griffin*, 71 Pa. 240; *Stephenson v. Gray*, 17 B. Mon. (Ky.) 193; *Putnam v. Putnam*, 8 Pick. 433; *Medway v. Needham*, 16 Mass. 157; *Com. v. Putnam*, 1 Pick. 136; *Scott v. Atty. Gen.*, 11 P. D. 128; *Warter v. Warter*, 15 P. D. 152.

This doctrine is denied in *Pennegar v. State*, 87 Tenn. (3 Pickle), 244, 10 S. W. 305. After a decree of divorce in Tennessee prohibiting the wife from remarriage dur-

ing the life-time of her husband, the wife married Pennegar, her paramour, in Alabama, while the husband was living, and immediately returned to Tennessee, where the parties cohabited openly as husband and wife, and Pennegar was indicted for lewdness. It was held that he was guilty, not because such provision of the statute had any extraterritorial effect, but because the marriage was void as being contrary to the settled policy of the state. The cases cited above were disapproved by the court and the *dictum* of an English case was followed. The court quoted *Brook v. Brook*, 9 H. L. Cas. 193: "If a marriage is absolutely prohibited in any country as being contrary to public policy and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which the marriage is not prohibited, to celebrate a marriage forbidden by their own state, and, immediately returning to their own state, to insist on their marriage being recognized as lawful." In this case a marriage of a man to the sister of his deceased wife

In some states the party found guilty of adultery is prohibited from marrying the *particeps criminis*. A similar prohibition is found in Scotland.<sup>1</sup> "There is," says Macqueen, "a standing order of the House of Lords that every divorce bill should contain a clause of this sort; . . . but though required in the bill the clause is not retained in the act, . . . all the feelings of humanity, and all the dictates of policy, suggesting that the guilty parties ought not to be debarred from making amends to social order by entering into matrimony. To prevent marriage in such a case would be but to prolong the unseemly spectacle of adultery, and to inflict bastardy on the innocent and helpless offspring."

The marriage of the adulterer with his paramour is not void unless the statute expressly declares it to be so.<sup>2</sup> In conformity with the construction of all statutes regulating marriage and providing penalties for violating the regulations, a marriage, violating a statutory prohibition referred to in this section, is voidable only and not void.<sup>3</sup> In some states, however, a marriage prohibited by statute is held to be absolutely void.<sup>4</sup> But the better and prevailing doctrine is believed to be that no marriage in violation of penal or directory laws is to be held void unless the statute expressly declares that such violation renders the marriage void.

**§ 589. Bigamy as a cause for divorce.**—This chapter proceeds upon the doctrine that if the first marriage is valid and undissolved, the second marriage is a nullity *ab initio*,

was held void, although the parties had married while temporarily in Denmark, where such marriage is valid. The Tennessee case cites and approves Kinney *v.* Com., 30 Grat. 858; State *v.* Kennedy, 76 N. C. 251, and State *v.* Ross, 76 N. C. 242, all cases in which the marriage of a white person and a negro in another state, for the purpose of evading local laws, was held invalid.

<sup>1</sup> Douglas *v.* Douglas, Mor. Dict. 329.

<sup>2</sup> Adams *v.* Adams, 2 Chester (Pa.), 560.

<sup>3</sup> Mason *v.* Mason, 101 Ind. 25; Park *v.* Barron, 20 Ga. 702.

<sup>4</sup> Barrowdale's Estate, 28 Hun. 336; Marshall *v.* Marshall, 4 Thomp. & C. 449; Cropsey *v.* Ogden, 11 N. Y. 228; Thompson *v.* Thompson, 114 Mass. 566; Ponsford *v.* Johnson, 2 Blatchf. 51; Fuller *v.* Fuller, 40 Ala. 301.

and the only relief that can be obtained in such cases is to have the subsequent marriage annulled. Although the statute includes bigamy with other causes for divorce, the intention is to provide a remedy for void marriages. Where the statute provides that a void marriage shall be valid until annulled, the second marriage will be treated as valid and subsisting until such decree of annulment is rendered. In effect this would make the issue of the void marriage equal heirs with the issue of the first marriage, and in some instances the second wife would be entitled to alimony. The terms of the statute governing marriage and divorce may contain such omissions and expressions as to make it clear that bigamy is to be treated as a cause for divorce and not a ground for annulment of the marriage. But unless this intent clearly appears, the true construction is that the statute is intended to confer jurisdiction upon the court to grant the proper relief in certain cases, and the fact that a ground for nullity was included among causes for divorce will not prevent the court from annulling the marriage and thus grant the same relief that might have been obtained in the ecclesiastical courts. The statutes also declare the marriage of one of the parties to a third person is a cause for divorce. Both forms of statute are perhaps unnecessary, as the void marriage can be annulled and the remedy for subsequent void marriage is a divorce for adultery.

**§ 590. Effect of void marriage at the common law.—** A void marriage at common law had no legal effect. Children born of such marriages were bastards, and the supposed wife was not entitled to dower or property rights.<sup>1</sup> The wise and humane rule of the civil law relieving the innocent party from the result of a grievous mistake in contracting a void marriage has not softened the harshness of the common law. Legislation has, however, mitigated the evil consequences of the void marriage. In some states such marriage

<sup>1</sup>Smith *v.* Smith, 5 Or. 186; Donnelly *v.* Higgins, 9 Mo. 493; Woods *v.* Donnelly, 8 B. Mon. 113; *v.* Woods, 2 Bay, 476; Smart *v.* Jackson *v.* Claw, 18 Johns. 346; Whaley, 6 Sm. & M. 308.

is voidable and not void, or stands as a good marriage until annulled by the proper court.<sup>1</sup> In many of the states the statutes provide that the issue of all marriages deemed null in law shall nevertheless be legitimate.<sup>2</sup> But it is believed that in no state except Louisiana is the stern rule of the common law so modified as to give the innocent party any right to her husband's estate. Either party may obtain a decree annulling a bigamous marriage. The ordinary rules of estoppel in cases of fraud do not apply to this action, because the marriage is void independently of any fraud or admissions of the guilty party who has entrapped the other into the marriage. Sometimes relief is granted on the application of the guilty party.<sup>3</sup>

**§ 591. Void marriages under the civil law.**—The laws of Louisiana are derived principally from the civil law as it existed in France and Spain. The civil code of that state relating to putative marriages is the same as the French code, and provides that "the marriage which has been declared null produces its civil effects as it relates to the parties and their children if it had been contracted in good faith. If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor and in favor of children born of the marriage."<sup>4</sup> This is a

<sup>1</sup> *Valleau v. Valleau*, 6 Paige, 207; *Watts v. Owens*, 62 Wis. 512; *Glass v. Glass*, 114 Mass. 563; *Hatwell v. Jackson*, 7 Tex. 576; *Graham v. Bennet*, 2 Cal. 503; *Curtis v. Hewins*, 11 Met. 294; *Hiram v. Pierce*, 45 Me. 367; *Earle v. Dawes*, 3 Md. Ch. 230.  
*Cropsey v. McKinney*, 30 Barb. 47; *Gall v. Gall*, 114 N. Y. 109; *White v. Lowe*, 1 Redf. 376; *Wyles v. Gibbs*, 1 Redf. 382; *Spicer v. Spicer*, 16 Abb. Pr. (N. S.) 112; *Machini v. Zanoni*, 5 Redf. 492; *Jones v. Zoller*, 32 Hun, 280, 29 Hun, 551. See construction of California civil code, sec. 61, in *Jackson v. Jackson*, 94 Cal. 446, 29 P. 957.

<sup>2</sup> *Teter v. Teter*, 101 Ind. 129; *Wright v. Lore*, 12 O. St. 619; *Dyer v. Brannock*, 66 Mo. 391; *Lincecum v. Lincecum*, 3 Mo. 441; *Harris v. Harris*, 85 Ky. 49, 2 S. W. 549; *Bowers v. Bowers*, 1 Ab. Pr. 214;

<sup>3</sup> *Glass v. Glass*, 114 Mass. 563; *Anonymous*, 2 Thompson & C. 558, 15 Abb. Pr. (N. S.) 171; *Miles v. Chilton*, 1 Rob. Ec. 684; *Norton v. Seaton*, 3 Philiim. 147. See *contra*, *Tefft v. Tefft*, 35 Ind. 44.

<sup>4</sup> Articles 117 and 118 of the Civil Code of Louisiana, and articles 291, 292, Napoleon Code.

wise and beneficent rule, relieving the innocent party and his or her heirs from all forfeitures, and declaring the children of the marriage legitimate. Similar provisions might well be adopted in all the states. The good faith here referred to means an honest and reasonable belief that the marriage was valid and that there existed no legal impediment thereto.<sup>1</sup> The party is deemed to have exercised good faith whether she has made a mistake of law or of fact.<sup>2</sup> Although the marriage between an uncle and niece may have been a nullity, the wife is held to have acted in good faith where she acted upon the advice of friends and counsel that such marriage would be valid.<sup>3</sup> A wife does not act in good faith where she relies upon the mere statement of the man that he is divorced, when she has been informed by the first wife that there was no divorce and has been warned by others to the same effect.<sup>4</sup> Perfect good faith is shown where a decree of divorce has been obtained but is void for want of jurisdiction or other cause.<sup>5</sup> Under this code a woman who is deceived into a marriage with a man who has a wife living and undivorced becomes entitled to all the rights of a wife, and the children born of this marriage are legitimate.<sup>6</sup> Thus, where the second wife marries in good faith while the first marriage is undissolved, at the death of the husband she and her children by deceased will share the community property with the first wife and her children

<sup>1</sup> *Harrington v. Barfield*, 30 La. An. 1297; Succession of Navarro,

24 La. An. 298; *Abston v. Abston*,

15 La. An. 137.

<sup>2</sup> Succession of Buissiere, 41 La. An. 217, 5 So. Rep. 668.

<sup>3</sup> *Id.*

<sup>4</sup> Taylor's Succession, 39 La. An. 823. She does not act in good faith where she deserts her husband and marries another man and resides in the same community as her husband. In such case she is not entitled to a share of the second hus-

band's estate. Succession of Llula, 44 La. An. 61.

<sup>5</sup> *Smith v. Smith*, 43 La. An. 1140.

<sup>6</sup> *Gaines v. New Orleans*, 6 Wall. 642; *Gaines v. Hennen*, 24 How. (U. S.) 553; *Summerlin v. Livingston*, 15 La. An. 519; *Colwell's Succession*, 34 La. An. 265; *Hebert's Succession*, 33 La. An. 1099; *Hubbell v. Inkstein*, 7 La. An. 252. See, also, *Gregory v. Dyer*, 15 Lower Canada J. 223; *Morin v. Cor de Pilots*, 8 Quebec, 222.

by deceased.<sup>1</sup> Or if the parties separate before the death of the husband, the interests of the parties of the second marriage will be regulated in the same manner. Should the disability which rendered the marriage void be subsequently removed, the putative marriage becomes good.<sup>2</sup>

<sup>1</sup> *Jerman v. Tenneas*, 44 La. An. 620; <sup>2</sup> *Smith v. Smith*, 1 Tex. 137. *Abston v. Abston*, 15 La. An. 187. *v. Smith*, 18 Tex. 141; *Patton v. Philadelphia*, 1 La. An. 98.

## FRAUD, ERROR AND DURESS.

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### § 600. In general.

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**§ 600. In general.**—The three grounds for annulment of marriage—fraud, error and duress—are best treated together in the same chapter, since they are cognate subjects. These elements occur in the same cases in a manner rendering it difficult to give each subject a separate analysis. Thus, where a woman, pregnant by another, procures a marriage with a man who has sinned with her, by falsely representing that the child is his, and by the threats of arrest and imprisonment, all three of the subjects are involved in the case.

The subject is difficult and judicial opinions are few and not very satisfactory. It would seem that the fraud which justifies the cancellation of an ordinary contract would be sufficient to relieve a party from a marriage procured by

fraud. The ordinary contract, if sustained, may impose a pecuniary loss from which the injured party will easily recover without serious or continued evil consequences. But if a marriage procured by fraud is not annulled the most serious consequences follow; the parties are bound in law to love and cherish when in fact this is impossible. The fraud and duress engender a loss of respect and hatred which will prevent the performance of duties of the marriage, and the relation will not exist except in its legal effect. A decree affirming a marriage procured by fraud sufficient to entrap the weaker party is in such case a mere nullity so far as the stability of the marriage relation is concerned, but is what the defrauding party designed it to be—a decree conferring all the property rights of a valid marriage. Public policy, it would seem, does not require the weaker party to forfeit property rights in such cases in order to sustain the stability of marriage as a public institution. On the contrary it would seem that as marriage entails such important responsibilities, imposes duties, both public and private, and continues these duties and responsibilities throughout the joint lives of the parties, that public policy would require the marriage to be annulled for a less degree of fraud than would render a contract voidable. Thus, where a professional thief, without means, by fraudulent representations procures a conveyance of real estate from a credulous and confiding woman, she is entitled, by all authorities, to have this conveyance set aside. But if this same thief should, by representations as fraudulent and effective, persuade the woman that he has character and wealth, and she in reliance thereon marries him, the courts have not agreed that the marriage should be annulled. One line of authorities maintain that his representation as to wealth and character, although sufficient to deceive the credulous party and obtain consent to the marriage, is nevertheless a small deception as to a non-essential fact—a mere exaggeration which is immaterial if the party is in fact of sound mind and perfect body. The relief is denied because it would tend to weaken the sentiment and stability of mar-

riage if such misrepresentations were grounds for annulment. Directly opposed to this is the view that if a marriage is procured by such representations it should be annulled; that to deny relief in such a case will not tend to maintain the stability of marriage as a public institution, but will rather tend to bring reproach upon the administration of justice; that no mandate of the law will deter the weak, credulous and ignorant from indiscreet marriage. The latter view is the most humane and practical, the best public policy and most consonant with the general law of fraud, but must be received with caution and subject to some exceptions.

The exceptions are created by the fact that marriage involves the interest of the state, the rights of the unborn, the social and the legal relations of husband and wife to the general public. Marriage begins by contract and results in a *status*. If, before children are begotten, before debts are created, real estate involved, and the community have long recognized the relation, the injured party seeks relief from fraud, error or duress, it seems clear that no consideration of public policy will prevent a court from annulling a marriage where the relation has not fully ripened into the complications of a public *status*. In such case the marriage is but little more than a contract; and, in view of the serious consequences to follow, the degree of fraud which vitiates a contract should be sufficient.

But after long cohabitation, when a child is begotten, debts created and titles acquired, the public has an interest in the continuance of the relation. In such case the law is clear. The injured party is denied relief because the delay is too great or the marriage is affirmed. The authorities are not in accord on many questions relating to fraud, and it may be said that fundamental principles of this most difficult subject are still in dispute.

**§ 601. Jurisdiction in absence of statute.**—Although the statute did not specify fraud as a ground for the annulment of marriage, the courts may determine cases of this

kind under the general jurisdiction of courts of equity to annul fraudulent contracts.<sup>1</sup>

In New Jersey, at a time when the constitution prohibited legislative divorces and there was no provision of constitution or statute conferring jurisdiction in such cases upon any tribunal, it was held that the court of chancery had, under its general power to annul fraudulent contracts, the jurisdiction to annul a marriage on account of fraud.<sup>2</sup>

**§ 602. Fraud where the marriage is not consummated.** After the marriage is consummated the parties have fully executed the contract of marriage; their *status* is fixed so far as the public is concerned, the property rights of each party are determined with reference to their new relation, and children have acquired rights. To disregard these rights and to annul the marriage is a harsh remedy, not to be resorted to except in extreme cases of fraud or mistake. But before consummation the parties stand upon almost the same footing as the parties to an ordinary contract. In one case there has been a ceremony performed before a priest or some person authorized by law, and in the other case the contract is oral or reduced to writing, and signed before witnesses. No writing however formal, and no signing however well attested, will prevent the law from relieving the

<sup>1</sup> Clark *v.* Field, 13 Vt. 460; Keys *v.* Keys, 22 N. H. 553; Burtis *v.* Burtis, Hopkins, 557; Sloan *v.* Kane, 10 How. Pr. 66; Aymar *v.* Roff, 3 Johns. Ch. 49; Wightman *v.* Wightman, 4 Johns. Ch. 343; Scott *v.* Schufeldt, 5 Paige, 48; Respublica *v.* Henrici, 3 Wheel. C. C. 505; Hull *v.* Hull, 15 Jur. 710; Jolly *v.* McGregor, 3 Wils. & S. 85. In the following cases jurisdiction was assumed: Robertson *v.* Cole, 12 Tex. 356; Weir *v.* Still, 31 Ia. 107; True *v.* Ranny, 1 Foster (N. H.), 52; Reynolds *v.* Reynolds, 85 Mass. 605. The federal courts have jurisdiction to annul a written contract

of marriage obtained by fraud although there is a suit pending in the state courts to obtain a decree that a marriage exists between the parties. Compare Sharon *v.* Hill, 22 Fed. 1, and Sharon *v.* Sharon, 67 Cal. 185. It seems that the validity of a marriage may be determined in a collateral suit in a law court, but only as to that particular proceeding. Feriat *v.* Gojon, Hopkins' Ch. 478; Clark *v.* Field, 13 Vt. 460.

<sup>2</sup> Carris *v.* Carris, 24 N. J. Eq. 516 (1873), citing and approving the decisions of New York.

injured party from the fraud, error or duress which induced him to enter into the contract. And the question arises, Shall a mere ceremony of marriage be set aside like any formal contract where the innocent party discovers the fraud or mistake, and escapes from the control of the other before consummation? Although such cases have been reported, no one of them contains a reference to this distinction, that consummation materially alters the *status* of the parties; and none of them affirm or deny that ordinary fraud would be sufficient where the defrauded party repudiated the marriage before consummation.<sup>1</sup> In one case we find reference made to the mere fact that there was no consummation, but the court seems to have proceeded upon the theory that the material fraud in obtaining a license was sufficient. The defendant in this case was a coachman, and while driving about the city in such employment he inveigled his employer's daughter, a child fifteen years old, into a marriage, having first obtained a license by falsely swearing that she was of age. The court was of the opinion that such marriage was not valid. "If, however, notwithstanding this crime, the parties had voluntarily lived together as man and wife, she knowing it had been committed, the marriage would be held valid on the principle of acquiescence."<sup>2</sup>

Where there has been no consummation, any fraud which would be sufficient to annul a contract should in reason be sufficient to annul a marriage ceremony. No satisfactory reason of the law will justify the courts in declaring valid such a contract of marriage when tainted with fraud or duress, where the only effect will be the punishment of the

<sup>1</sup>Shoro *v.* Shoro, 60 Vt. 268, 14 A. 355; Harford *v.* Morris, 2 Hag. Con. 177; Keys *v.* Keys, 22 N. H. 553; 423; Hull *v.* Hull, 15 Jur. 710; Res-Robertson *v.* Cole, 12 Tex. 356; publica *v.* Henrici, 3 Wheeler, Crim. Sloan *v.* Kane, 10 How. Pr. 66; Cas. 505; Dalrymple *v.* Dalrymple, 2 Hag. Con. 54; Harford *v.* Morris, Jolly *v.* McGregor, 3 Wils. & S. 85; 2 Hag. Con. 423. Perry *v.* Perry, 2 Paige, 501; Ferlat *v.* Gojon, Hopkins, 478; Portsmouth *v.* Portsmouth, 1 Hag. Ec. 356. <sup>2</sup>Lyndon *v.* Lyndon, 69 Ill. 43. See, also, Robertson *v.* Cole, 12 Tex. 356.

innocent and the confiscation of his or her property by the deception. If the marriage is declared valid it will exist in name only, preventing both parties from marrying again and bringing the marriage relation into disrepute. Every reason for relief from fraud is applicable here, where a denial of relief is fraught with evil consequences much greater than those flowing from ordinary contracts.

**§ 603. Affirmance of marriage.**—Ordinarily a party who continues cohabitation after being induced by fraud to enter into a marriage is held to have affirmed the marriage, and is bound by it. Before a party discovers the fraud of which he complains, he is not barred by any conduct which would otherwise prove a ratification or affirmation of the marriage. No doctrine of condonation or estoppel applies where the party asking for relief separated from the other as soon as the wrong was discovered. But for reasons of public policy, a marriage should not be annulled after the parties have cohabited as husband and wife for years. There are, however, some instances where the fraud must be discovered within a reasonable length of time after the marriage, and in such cases a cohabitation until the discovery of fraud is not a bar; as where the fact that the wife was pregnant by another is not discovered until some months after the child is born. Thus, in a Michigan case, a young man became acquainted with a woman by correspondence, and afterwards married her on the third day after meeting her. Six months after the marriage and during the husband's absence she gave birth to a fully-developed child. When the child was two weeks old he came home, and the wife explained to him that the birth was premature, and that the child when born was undeveloped, but had developed wonderfully in two weeks' time. The husband, being ignorant and inexperienced, accepted this explanation, and lived with the wife for six months, when the fraud was discovered and he separated from her. It was held that such cohabitation did not bar the suit.<sup>1</sup> By statute in some states cohabita-

<sup>1</sup> *Harrison v. Harrison*, 94 Mich. 599, 54 N. W. 274.

tion after the marriage will bar an action to annul the marriage.<sup>1</sup> But such statutes are to be interpreted with reference to the common law, and refer to cohabitation after discovery of the fraud.

**§ 604. Misrepresentation of chastity.**—Ante-nuptial chastity is not deemed such *essentialia* of the marriage relation that a misrepresentation concerning it amounts to a fraud rendering the marriage voidable.<sup>2</sup> It is not denied that such misrepresentation is a gross fraud, causing great unhappiness, where a virtuous person finds he is married for life to prostitute or a woman whose ill repute is generally known. Nor is it denied that the consequences may be equally disastrous where the incontinence has resulted in pregnancy; for, in either case, if the parties have any high sense of honor or virtue, they will refuse to continue the marriage relation. But the law denies relief in such cases on grounds of public policy. In a carefully considered opinion in a case of concealed pregnancy, Bigelow, Chief Justice, reasons as follows: “In regard to continence, as well as other personal traits and attributes of character, it is the duty of a party to make due inquiry beforehand, and not to ask the law to relieve him from a position into which his own indiscretion or want of diligence has led him. Certainly it would lead to disastrous consequences if a woman who had once fallen from virtue could not represent herself as continent, and thus restore herself to the rights and privileges of her sex, and enter into matrimony without incurring the risk of being put away by her husband on discovery of her previous immorality.”<sup>3</sup> If marriages should be annulled for this cause, the incontinent would live without hope, condemned to celibacy and doomed to incontinence.

<sup>1</sup> *Glinsman v. Glinsman*, 12 How. v. Carrington, 2 De F. & J. 481. Pr. 32; *Muller v. Muller*, 21 Weekly Digest (Pa.), 287. See, also, *Best v. Best*, 1 Adams, 411; *Graves v. Graves*, 3 Curties,

<sup>2</sup> *Varney v. Varney*, 52 Wis. 120; 235.

*Williams v. Williams*, 63 Wis. 58; <sup>3</sup> *Reynolds v. Reynolds*, 85 Mass. Allen's Ap., 99 Pa. St. 196; Evans 605.

It would prevent reform and permit the reputation of the virtuous to be destroyed by manufactured testimony. And it has been suggested that, in states where communications between husband and wife are excluded, if the husband, on being informed by her of the misbehavior, should forgive her wrong-doing, this forgiveness could not be shown in a suit to annul the marriage for this cause.<sup>1</sup> Ante-nuptial incontinence is a cause for divorce.<sup>2</sup>

**§ 605. Representing her child legitimate — Divorcee claiming to be single.**— Nor is the concealment of ante-nuptial incontinence resulting in the birth of a child a fraud sufficient to render the marriage voidable. A representation by a woman that her child is the fruit of a former marriage, when in fact the child is illegitimate, is not a fraud in the *essentialia* of the marriage relation, and in this respect resembles misrepresentations as to chastity.<sup>3</sup> The law encourages the mother of a bastard child to reform and protects her in the marriage relation, and refuses to annul the marriage for concealing her unchastity.

For similar reasons misrepresentations as to the *status* of the person, whether single or divorced, is not such a serious fraud as will justify an annulment of the marriage. If a woman represents herself as a maiden when she is a widow or a divorced woman, or if a man represents that he is a bachelor when he is a widower or a divorcee, the misrepresentation is not a sufficient fraud, if the complaining party does not discover the fraud before the marriage is consummated.<sup>4</sup>

**§ 606. Pregnancy concealed from innocent husband.**— It is now well established that a marriage is voidable for fraud where the woman conceals her pregnancy from the man who has had no improper relations with her and who

<sup>1</sup> *Leavitt v. Leavitt*, 13 Mich. 453. In this case the wife represented her-

<sup>2</sup> See *Ante-nuptial incontinence*, self single when in fact she had § 380. been married and had obtained a

<sup>3</sup> *Farr v. Farr*, 2 MacArthur, 35; *Smith v. Smith*, 8 Or. 100. divorce from her former husband. The opinion does not state that the

<sup>4</sup> *Fisk v. Fisk*, 12 Misc. 466. In marriage was consummated.

marries her without knowledge of her condition.<sup>1</sup> The true reason for considering this concealment a fraud is that a woman who consents to marry a man impliedly represents herself to her future husband as chaste and able to bear him his own children. "A child," said Field, J., "imposes burdens and possesses rights. It would necessarily become a charge upon the defendant and, through her, upon the plaintiff. It would become presumptive heir of his estate, and entitled under our law, as against his testamentary disposition, to an interest in his property acquired after marriage, to the deprivation of any legitimate offspring. *The assumption of such burdens, and the yielding of such rights, cannot be inferred in the absence of actual knowledge of her condition on his part.*"<sup>2</sup> And we find the same reason given by the Massachusetts court: "Therefore a woman who is incapable of bearing a child to her husband at the time of her marriage, by reason of her pregnancy by another man, is unable to perform an important part of the contract into which she enters; and any representation which leads to the belief that she is in a marriageable condition is a false statement of a fact material to the contract, and on well settled principles affords good ground for setting it aside and declaring the marriage void." . . . "There is no sound rule of law or consideration of policy which requires that a marriage procured by false statements or representations, and attended with such results upon an innocent party, should be held valid and binding on him."<sup>3</sup>

These reasons, it will be noticed, have peculiar reference to marriage as a physical union. But if other reasons were necessary to sustain a doctrine so manifestly sound and just, it may be urged that marriage is also an intellectual and

<sup>1</sup> Baker *v.* Baker, 13 Cal. 87; Reynolds *v.* Reynolds, 85 Mass. 605; Morris *v.* Morris, Wright, 630; Donovan *v.* Donovan, 91 Mass. 140; Carris *v.* Carris, 24 N. J. Eq. 516; Nadra *v.* Nadra, 79 Mich. 591, 44 N. W. 1046; Harrison *v.* Harrison, 94 Mich. 599, 54 N. W. 275; Ritter *v.* Ritter, 5 Blackford, 81. <sup>2</sup> Baker *v.* Baker, 13 Cal. 87. <sup>3</sup> Reynolds *v.* Reynolds, 85 Mass. Allen's Ap., 99 Pa. 196; Nadra *v.* Nadra, 79 Mich. 591, 44 N. W. 1046;

spiritual union, based upon love and confidence, and a deception so base is a fraud upon the party contracting for such love and confidence. If a bride is pregnant by a stranger at the time of marriage she is incompetent to enter that relation, viewed in its highest and holiest sense; and her mere consent to enter the relation implies a warranty on her part that she is competent to do so. Manifestly, it is not required that a man shall make indecent and insulting inquiries before marriage. But the courts have held that a man, having married a woman who has fallen at least once, takes her with notice that she is unchaste and is thereby put upon his guard, and is bound to accept as his own any child that may be born after the marriage, whether black or white.<sup>1</sup> The injustice of such decision is as remarkable as the erroneous conclusion of fact upon which the reasoning is based. It is not a fact that a woman, who once yields to the man she loves, has been unchaste. Such presumption is violent and is not based upon the usual course of human conduct. It is in contrast with that wholesome and just presumption of the law that innocence is always presumed. And the law of notice is not applicable to questions of chastity for certain physical reasons not necessary to be discussed here.

Some courts have denied relief because the plaintiff is himself participant in the wrong. The rule of equity that the plaintiff must come with clean hands applies to those cases only where the plaintiff is guilty of some evil conduct in reference to the transaction before the court, and relief is never denied because he leads an immoral life, or is unscrupulous in other business. Here the wrong complained of is a child begotten by another which the woman attempts to force upon him as his own. It is difficult to

<sup>1</sup> *Seilheimer v. Seilheimer*, 40 N. Scroggins *v. Scroggins*, 3 Dev. & B. J. Eq. 412; *Crehore v. Crehore*, 97 Mass. 330; *Long v. Long*, 77 N. C. 304; *Foss v. Foss*, 94 Mass. 26; *States v. States*, 37 N. J. Eq. 195; 535. See dissenting opinion, *Sissung v. Sissung*, 65 Mich. 168, 31 N. W. 770.

see how this rule applies to these cases where the plaintiff has had intercourse with a woman who at the time was pregnant by another.<sup>1</sup>

**§ 607. Concealed pregnancy, husband guilty of fornication.**—The same evil consequences flow from the birth of a child begotten by a stranger, whether the husband is guilty or innocent of fornication with the woman. He must support a bastard child who comes into his home an uninvited guest and unwelcome heir. If an upright and right-minded man, who, having, as he supposed, seduced a virtuous woman, and then, to obliterate her sin as far as he can, has married her, believing she bears in her womb the fruit of their first indiscretion, discovers that he has been deceived, is he bound by such a marriage? Must he be compelled to live with, or at least support, a woman who has thus betrayed him? Must he be compelled to recognize this bastard as his own offspring, as the heir of his own name and estate, as an object of life-long humiliation? Upon what principle of justice can the law impose such consequences except upon the ground that he voluntarily consented to it? No good purpose will be subserved by charging upon a man who has

<sup>1</sup> These reasons are now generally accepted. But in an early case in North Carolina the court, in refusing to release certain white parties where the wife gave birth to a mulatto child, did not recognize fraud as a cause for annulment of marriage. *Scroggins v. Scroggins*, 3 Dev. 533 (1832). The court said there was, "in general, no safe rule but this: *that persons who marry agree to take each other as they are.*" But subsequently this doctrine was abandoned and marriage annulled where a woman, after the birth of her mulatto child, represented that the child was white and the result of their intercourse, when in fact it was not, and thus persuaded the man to marry her. *Barden v. Barden*, 3 Dev. 548. The court justified this change of doctrine as a "concession to the deep-rooted and virtuous prejudice of the community." From which Rodman, J., infers that the court had ascertained that the common sense of the people rejected the former opinion and was thus induced to recede from such doctrine. See dissenting opinion of Rodman, J., in *Long v. Long*, 77 N. C. 304. See criticism of *Scroggins v. Scroggins* in *Baker v. Baker*, 13 Cal. 87, and *Sissung v. Sissung*, 65 Mich. 168, 31 N. W. 770.

been guilty of fornication, a child of foreign blood, or by attempting by a decree to coerce him to live with his betrayer, when there is no union in fact, and such decree will be a vain record except as an "instrument of undeserved and perpetual torture." If such a marriage cannot be annulled, then the only safe course for such a man is to refuse to marry the woman, or, if he discovers the truth after marriage, to desert her and allow her to obtain a divorce.

**§ 608. False representation as to paternity.**— Suppose that a woman, pregnant by another, induces a man, who has had intercourse with her while she is pregnant, to believe that she is pregnant from such intercourse, and she insists upon a prompt marriage to save her reputation. The man, believing the woman to be virtuous and the unborn child to be his own, marries her with the worthy motives of saving her reputation and making the best amendment possible for this supposed seduction. Can he have the marriage annulled for this fraud when he proves conclusively that the woman was unchaste before he met her? It has been decided that such marriage is not voidable because he was put upon his guard by participating with her in crime, and should have made careful inquiry by consulting a physician as to her condition.<sup>1</sup> In Michigan it was said concerning a case presenting the same question, that "the fraud in this case is a more potent reason for a nullification of the marriage than it would be in a case where the man was ignorant of the pregnancy. In such a case the woman makes no representation, except as the concealment of her condition may tend in that direction; but here a false statement is made, and an appeal based thereon to the better and kindlier nature of the man, who, moved thereby, undertakes to make restitution for his supposed wrong, and, in so doing, falls easily into the trap laid for him by a wanton and designing woman. He is certainly entitled to a release."<sup>2</sup> "The essence of the

<sup>1</sup> *States v. States*, 37 N. J. Eq. 195; 31 N. W. 770. In this case the *Foss v. Foss*, 94 Mass. 27. lower court overruled a demurrer

<sup>2</sup> *Sissung v. Sissung*, 65 Mich. 168, to plaintiff's petition, and the rul-

marriage contract is wanting when the woman, at the time of its consummation, is bearing in her womb, knowingly, the fruit of her illicit intercourse with a stranger; and the result is the same whether the husband is ignorant of her pregnancy, and believes her chaste, or is cognizant of her condition, but has been led to believe the child is his."<sup>1</sup>

**§ 609. False representation as to paternity — Child born before marriage.**— After the birth of the child a different case is presented. Here the husband has notice, before he marries, of two facts that should put him upon his guard: the date of the birth, from which the period of gestation may be calculated, and also the color and appearance of the child, which may often disclose its paternity. If a man, with notice of these important facts, chooses to rely upon the representations of the woman that he is the father of the child, it would seem that he should be bound by his negligence in not making full inquiry. But the law of notice is not applied to such cases. Here is a deliberate fraud by the woman, and a mistake of fact as well as a reliance upon the misrepresentations. Where a white woman, after illicit intercourse with a white man, gave birth to a mulatto child, yet persuaded the man that he was the father of the child, and thus brought about a marriage by her false representations, the

ing was affirmed by an equal division of the court. Although such division prevents any direct decision of the whole court, the reasons assigned in the opinion are worthy of examination.

<sup>1</sup>Id. And in this connection the court cites the following from the opinion of Bigelow, C. J., in *Reynolds v. Reynolds*, 85 Mass. 605: "A husband has a right to require that his wife shall not bear to his bed aliens to his blood and lineage. This is implied in the very nature of the contract of marriage. Therefore a woman who is incapable of

bearing a child to her husband at the time of her marriage . . . is unable to perform the contract into which she enters; and any representation which leads to the belief that she is in a marriageable condition is a false statement of a fact, material to this contract, and, on well settled principles, affords good ground for setting it aside, and declaring the marriage void." It will be observed that this language was used with reference to concealed pregnancy, but the Michigan court considered it applicable to the case before it.

husband, upon afterwards discovering the fraud, was allowed a decree of annulment.<sup>1</sup>

**§ 610. Pretended pregnancy.**—If the parties have had illicit intercourse, the marriage will not be annulled because the woman falsely represents that she is pregnant and thus induces the man to marry her to prevent disgrace.<sup>2</sup> In such cases the pregnancy is always a doubtful matter, and if it does not exist it is still a matter of some uncertainty that a child will be born. The husband having placed himself in such a position that he cannot tell whether the woman is or not pregnant, and is thus in her power, is still free to pursue his own course. He may dishonor the woman by refusing to marry her, and, if a child is born, be liable to bastardy proceedings. Or he may choose to marry her from such

<sup>1</sup> *Barden v. Barden*, 3 *Devereaux* (N. C.), 548 (1832). And see, also, similar case, *Scott v. Schufeldt*, 5 *Paige*, 43 (1835), where one object of the marriage was to avoid pending bastardy proceedings. The majority of the court were of the opinion "that when a man is acting in good faith, and marries with the design on his part to repair the injury done to a female, whom he supposes to be the reluctant victim of his own solicitations, which a strong and exclusive affection for him made her unable finally to resist, advantage shall not be taken of his confidence and honorable principles of action to draw him by false tokens and artful devices of this sort. . . . But by awaiting that event (birth), and promptly following it up by consummating the contract, while the child was very young, it is but reasonable to conclude that the birth of the child, and the belief that it was his own, constituted the prevailing, perhaps

the chief, motive and inducement for this action. The obstacle with me on this part of the case is, that the color of the child is an object of the senses; and that it can hardly be supposed that a man would marry a woman because he believed her to be the mother of his child, without being drawn, even by curiosity, not to say instinctive affection, to see the child itself. But it may be that in so young an infant, whose mother was white, it might not be in the power of an ordinary man, from inspection of the face and other uncovered parts of the body, to discover 'the tinge, although it were so deep as to lead to the belief now that it is the issue of a father of full African blood.' This case was then reversed and remanded for proofs.

<sup>2</sup> *Todd v. Todd*, 149 Pa. 60, 24 A. 128; *Tait v. Tait*, 3 *Miscellaneous R.* (N. Y.) 218; *Hoffman v. Hoffman*, 30 Pa. St. 417; *Fairchild v. Fairchild*, 43 N. J. Eq. 478.

excellent motives as to recompense the seduction as far as possible to shield her honor as well as his own, and to assume in advance liabilities which he believes are inevitable. When he marries under such circumstances, he voluntarily assumes a known risk that the pregnancy exists. He takes the woman for better or worse, and should not be released because no pregnancy existed and the unfortunate affair has resulted better than he has calculated. This is not a case of unmixed fraud, because the man relies not alone on her representations, but in part upon the knowledge of his guilty conduct. He does not assume unknown liabilities and conditions, as is the case where a man marries a woman whom he believes is chaste, when in fact she is concealing the fact that she is pregnant by another.

Where the marriage is thus voluntarily entered into with knowledge of the risks assumed, the question of consummation is immaterial, although if it existed it would be an additional reason for denying a decree.

**§ 611. Conspiracy to bring about marriage.**— It is a general rule that no conspiracy of third parties is adequate to render a marriage voidable unless the plaintiff was incapable of consent at the time, or did not, for some reason, give complete consent. If the marriage is the voluntary act of both parties, and neither of them is aware of fraud, the marriage is valid although it is brought about by the deceitful practices and fraudulent representations of third persons. If the conspiracy was instigated by one of the parties, or if the conspiracy of others is unknown until about the time of the marriage, and upon learning of the fraud he avails himself of it, the marriage would be voidable at the option of the innocent party if the fraud was otherwise sufficient. These general doctrines are subject to the control of the circumstances peculiar to each case; but it is, perhaps, safe to say that in other cases the conspiracy of third parties will not bind an innocent party to a bad marriage. If third parties combine, as in the case supposed by Lord Stowell, “to intoxicate another and marrying him in that perverted

state of mind, this court would not hesitate to annul a marriage on clear proof of such a cause connected with such an effect. Not many other cases occur to me in which the co-operation of other persons to produce a marriage can be so considered if the party was not in a state of disability, natural or artificial, which created a want of reason or volition amounting to an incapacity to consent."<sup>1</sup>

Where marriages have been annulled on account of fraud and conspiracy, the weaker party is generally imposed upon on account of youth or some mental incapacity which prevents intelligent consent. As where the marriage is declared void on account of fraud practiced by the trustee and solicitor of a party of weak mind;<sup>2</sup> or where a girl of tender years is entrapped into a marriage to which she gave apparent but feigned consent;<sup>3</sup> or where commissioners of the poor, for the purpose of effecting a change of the settlement of a woman "feeble both in body and in mind," bring about a marriage by threatening to withdraw all her support unless she marries the man whom they have hired for that purpose;<sup>4</sup> or where the relatives of an insane woman concealed her condition from the man, and by fraudulent devices and practices brought about the marriage.<sup>5</sup> The consent of one of the parties is obtained by fraud and conspiracy when a girl is intoxicated and taken before a priest, who supplies more liquor and performs the ceremony while she is under the influence of it and unable to give intelligent consent.<sup>6</sup> Where a marriage is contemplated, but no consent is given, it will be annulled where the girl is entrapped and surprised into a ceremony before the nature of it is

<sup>1</sup> *Sullivan v. Sullivan*, 2 Hagg. Con. 238. In this case the father of the husband, a minor, brought suit to annul the marriage of his son to a girl of humble birth on account of undue publication of banns and fraud.

<sup>2</sup> *Portsmouth v. Portsmouth*, 1 Hag. 355.

<sup>3</sup> *Ferlat v. Gojon*, Hop. Ch. 478.

<sup>4</sup> *Barnes v. Wyethe*, 28 Vt. 41.

<sup>5</sup> *Keys v. Keys*, 22 N. H. 553. The husband was the plaintiff in this case, and the marriage was annulled on account of the fraud and not the insanity of the wife.

<sup>6</sup> *Sloan v. Kane*, 10 How. Pr. 66.

made known to her, and the circumstances show her to be greatly excited and incapable of deliberate consent, and the marriage is not consummated.<sup>1</sup> A noted case of conspiracy was where a girl of fifteen was decoyed from her boarding-school by a false report that her mother was dangerously ill and had sent for her. The conspirators having thus obtained possession of her person, induced her to marry one of them, representing that her father had fled in great distress to evade arrest on account of bankruptcy, and reading a pretended letter from him asking her to save the estate by marrying this person. Before the marriage was consummated she was discovered by her friends. This marriage was declared void by act of parliament.<sup>2</sup>

**§ 612. False representations as to wealth and character.**—After consummation, a marriage will not be annulled on account of fraud of one of the parties in representing himself to be what he is not.<sup>3</sup> He may represent that he has wealth, or is of good character, and if the innocent party rely upon such representations no relief will be granted if the marriage is consummated before the fraud is discovered. Relief is denied in such cases for the reason that the remedy for the evils growing out of such marriages is not in facility of divorce; and if frequently innocent parties are freed from such marriages, it would result as an inducement for their frequent occurrence, and thus tend to disturb the sanctity with which the marriage bond should be regarded.<sup>4</sup> This is a frequent reason for denying relief in the most urgent cases of matrimonial wrongs, and does not appear very satisfactory to the writer. A court of equity might hastily relieve its docket of all cases of fraud.

<sup>1</sup> Cameron v. Malcolm, Mor. Dict. 12586. The conspirators were afterward convicted. Rex v. Wakefield, 69 Annual Reg. 316, 1 Deuc. Crim. Law, 4.

<sup>2</sup> Turner's Nullity of Marriage Bill, 17 Hans. Parl. Deb. 1133. The application was not made in the ecclesiastical courts because of the difficulty of proof, her testimony being inadmissible in that court.

<sup>3</sup> Klein v. Wolfsohn, 1 Ab. N. Cas. 134.

<sup>4</sup> Id.

arising from misrepresentation by a summary and harsh ruling that parties must exercise caution before entering into ordinary contracts, and that to relieve from a fraudulent contract would tend to disturb the contracts of the whole business world. Love is blind, and no law can prevent indiscreet marriages while deception and credulity exist. The unwary, who complain in these cases, are always ignorant of the law, and do not calculate upon *any* of the consequences of a hasty marriage, much less the legal remedies to which resort may be had. This reason has, therefore, no application to ill-considered marriages.

Another reason is that misrepresentation as to personal qualities is not a fraud or deception as to a material fact essential to the marriage contract. Why such fraud is immaterial is not easily explained. We have, however, a *dictum* that "the only general rule which can be safely stated is, that to render a contract void on the ground of fraud there must be a fraudulent misrepresentation or concealment of some material fact. What amounts to such misrepresentation or concealment, and whether the fact misstated or withheld is material, are questions to be decided according to the circumstances developed in each case as it arises for judicial determination. . . . Any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. Therefore no misconception as to the character, fortune, health or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities, which do not constitute the essential elements on which the marriage relation rests. The law, in the exercise of a wise and sound policy, seeks to render the contract of marriage, when once executed, as far as possible indissoluble. The great object of marriage in a civilized and Christian community is to secure the existence and permanence of the family re-

lation and to insure the legitimacy of offspring. It would tend to defeat this object if error or disappointment in personal qualities or character was allowed to be the basis of proceedings on which to found a dissolution of the marriage tie."<sup>1</sup>

Before the consummation of the marriage these reasons do not apply. The question is, Shall a mere ceremony of marriage be set aside when the fraud is discovered before a real union of the parties has in fact taken place? Here is a mere *status*, existing on the records only, without the inception of the family relation, and the annulment of which cannot disturb titles nor mislead creditors. Here no unborn children will "cry out from the mother's womb, demanding that they may not be bastardized, lose a father and know only a disgraced mother." Shall the court relieve an innocent party from a marriage existing in name only, or shall it declare the marriage valid by a decree which is futile in every way except to torture an innocent party, deprive him of his property and prevent his happy marriage to another? This question was determined in Iowa upon the following facts: An entire stranger in the community called upon a widow, representing that her friends had recommended her as a suitable person for a wife; and that he was a man of good character and high standing in society, and had many respectable friends and connections, and was able and willing to give any references she might desire. He came again, and allayed any fears she might have concerning his character; and represented that he had plenty of means, and was able to maintain her and her child. After a short acquaintance he procured a marriage license, and accompanied her to her mother's house; a justice of the peace was sent for and the marriage ceremony performed. After she escaped from his control and discovered that he was a convict just released from serving his third term in

<sup>1</sup> Reynolds *v.* Reynolds, 85 Mass. 605. Here the point adjudicated was that pregnancy was such a material fact that the concealment of it was a fraud vitiating the marriage contract.

the penitentiary, she refused him admittance to her house, and never lived or cohabited with him. The court refused to annul such marriage, doubting the sound public policy of doing so, and said: "Mere false representations by one of the parties as to his fortune, character and social standing will not avoid the marriage. If they should be so held, where would courts fix the limits of invalid marriages?"<sup>1</sup> The court overlooked the fact that no consummation took place. The injustice and hardship which this imposed was apparent to the court, for it was admitted that, but for the violation of rules and doctrines, it was desirable to relieve plaintiff from the consequences of her folly.<sup>2</sup>

This case has not been approved.<sup>3</sup> In a recent case in New York it was held that a marriage would be annulled where the consent of a young woman was obtained by a representation by defendant that he was honest and industrious, when in fact he was a professional thief; and was at the time of the suit in prison for crime.<sup>4</sup> The doctrine announced in this case is that a misrepresentation as to character is a material fraud, if in fact it was sufficient to induce the consent of the weaker party, and whether the misrepresentation had this effect or not is a question of fact. It is believed that this doctrine is sound, and is in conformity with well-established principles of equity. A husband sought to have his marriage annulled because he discovered, some

<sup>1</sup> Wier v. Still, 31 Ia. 107 (1870).

<sup>2</sup> Mr. Bishop criticises this case as one "in which the distinction between marriage consummated and not consummated would have been important, but it was not suggested by counsel, and it did not occur to the unaided thoughts of the judges. Thus, before the Iowa court, there was a case of gross fraud, such as would have annulled any other contract, wherein the woman took alarm before copula. But the attention of the court was

not directed to the element of non-consummation, and the case went against her on the ordinary reasoning, as applied to marriage consummated. The books of reports, as to other subjects, are full of cases like this, *which are regarded not otherwise than as if the unthought of fact did not exist.*"<sup>1</sup> Bishop, Mar., Sep. & Div., § 462.

<sup>3</sup> See criticism in Bigelow on Fraud, p. 93.

<sup>4</sup> Keyes v. Keyes, 6 Misc. 355, 26 N. Y. Supp. 910.

six years after the marriage, that his wife was a kleptomaniac, and this fact had been known and concealed from him by herself and relatives; and that the concealment of such fact was such a fraud as would render the marriage voidable. The court found the facts did not warrant relief, as the fact concealed was a mere personal trait and not an essential incapacity to enter the marriage relation.<sup>1</sup>

It is held that where a woman has made careful inquiry before marriage concerning the character of her husband and was assured of his good character by himself and others, she may have the marriage annulled for fraud, on discovering that he was, at the time of the marriage, a criminal and gambler.<sup>2</sup> The parties had lived together for several months before the fraud was discovered, but the marriage had resulted in the birth of a child or the result might have been otherwise. The early decisions seem to have held strictly to the rule that a party must make careful inquiry before entering into the marriage relation, and that no fraud discovered after marriage would be sufficient cause for annulment if the marriage had been consummated; but the tendency of the recent decisions is towards the more equitable rule that in marriage, as in contracts, the conduct of the defrauded party before discovery of the fraud will not constitute an affirmation by waiver of the fraud.

**§ 613. Fraud in obtaining license — False ceremony.—**

It is held that where a marriage license is procured by falsely swearing that the parties are of age, when in fact one is not, or obtaining a license by forgery, is a fraud sufficient to vitiate the marriage.<sup>3</sup> But aside from the fraud such cases may be based on other reasons equally satisfactory, such as lack of consent or non-age. It may be well to observe that a consummation of the marriage with knowledge of the fraud will render the marriage valid. Although there was fraud in procuring the license, if the woman was

<sup>1</sup> *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323.

<sup>2</sup> King v. Brewer, 8 Misc. 597.

able to understand the nature of her actions and was not laboring under duress, the marriage is valid.<sup>1</sup>

Where a woman was persuaded by false representations to believe that a valid license had been obtained, and that a person was a regularly ordained minister of the gospel, when in fact he was not, and the ceremony was illegal, it was held that such marriage was not void but voidable; and since the woman believed the proceedings valid at the time, and the parties lived together after discovery of the fraud, the marriage was now valid.<sup>2</sup>

**§ 614. Misrepresentation of age.**—Ordinarily, one who, by false representations, induces another to marry, is estopped by his own fraud and cannot maintain an action to annul the marriage. But where a minor fraudulently represents himself to be of the age of consent and thus induces a woman to marry him, he is not estopped by this fraud in an action to annul the marriage on the ground that he was in fact under the age of consent. It is held that an infant incapable, for want of age, to enter into a valid contract of marriage is also incapable to estop himself by fraudulent declarations.<sup>3</sup>

**§ 615. The evidence of fraud.**—Fraud is difficult to define, and yet the question whether deception was practiced and relied upon is seldom difficult when all the circumstances of each case are considered. And in these cases where pregnancy is concealed, or the woman falsely represents the paternity of the child, the right to annul the marriage should be based upon the circumstances peculiar to each case rather than upon rigid rules and wise maxims generally inapplicable and often blindly applied. The motives of the parties, the fact that the pregnancy is known to the wife, and her efforts to fasten its parentage upon the most responsible and desirable of her paramours, the man's motives in marrying, the dura-

<sup>1</sup> Crane *v.* Crane, 1891 Probate, 2 Farley *v.* Farley, 94 Ala. 501, 10 367; Field's Mar. Annulling Bill, 2 So. 646.

H. L. Cas. 48.

<sup>2</sup> Eliot *v.* Eliot, 77 Wis. 634, 51 N. W. 81.

tion of the marriage before the child is born, and the subsequent conduct of both parties, should all be considered. The case should not be summarily dismissed by a general rule that a man who marries a woman whom he knows to be unchaste is bound to acknowledge any child she may bear him.<sup>1</sup>

The deception must be judged by its results. The question is not whether such fraud would have deceived an ordinary man or woman, but whether, under the circumstances, the person was deceived. A fraud easily detected by one of mature and discreet mind may yet have misled a party not possessing ordinary mental powers by reason of youth, old age or mental weakness.<sup>2</sup> A girl of fifteen, while absent from home, was induced to marry a laborer who had been employed on her father's farm. She at first refused because she was too young and did not have the consent of her parents. He overcame her objections by the false representations that her parents knew of his intentions and would not care or object; that her father had promised him one of his farms and one of his daughters if he would work for him for four years; and that, if she was too young, she might keep the ceremony a secret and continue to attend school and reside with her parents. These false representations related to the essence of the contract and were held sufficient to uphold a judgment declaring the marriage contract void.<sup>3</sup>

A clear case must be made to overcome the presumption that a child born during marriage is legitimate. Where the birth occurs so soon after the marriage that the man must have had some notice of the pregnancy, the presumption is

<sup>1</sup> As is laid down in *Foss v. Foss*, Ferg. Const. Law, 37; *Field, Marriage Annulling Bill*, 2 H. L. Cas. 94 Mass. 26.

<sup>2</sup> *Robertson v. Cole*, 12 Tex. 356; *Lyndon v. Lyndon*, 69 Ill. 43; *Gillet v. Gillett*, 78 Mich. 184, 43 N. W. 1101; *Portsmouth v. Portsmouth*, 1 Hag. Ec. 355; *Harford v. Morris*, 2 Hag. Con. 423; *Allen v. Young*,

<sup>3</sup> *Moot v. Moot*, 37 Hun, 288, citing *Robertson v. Cowdry*, 2 Western Law J. 191, and *Hull v. Hull*, 5 Eng. L. & Eq. 589.

almost conclusive that he knew of her condition and would not have married the woman unless he had sinned with her. On the contrary, if the parties became acquainted but a short time before the marriage, and had no opportunity for intercourse during the period of conception, or if the woman's reputation was bad, the presumption can be easily overcome.<sup>1</sup> The knowledge of the situation of the parties constitutes the ground of the presumption.<sup>2</sup> If the pregnancy was concealed before marriage, no inference that the man is father of the child can be drawn from the fact that he married the woman. It is clear that the action to annul the marriage should be dismissed where it does not appear by clear and satisfactory evidence that the man is not the father of the child, since this must appear before the question of fraud becomes material.<sup>3</sup> Where the parties associated together a year before the marriage, and were engaged during a portion of that time, and there was no evidence of improper intimacy with other men, the inference that the husband is the father of the child born three and one-half months after the marriage is not overcome but is rather strengthened by such circumstances.<sup>4</sup>

**§ 616. Error or mistake.**—If a party is deceived and marries a person believing that person to be another, the marriage is void.<sup>5</sup> It is improbable that such cases will

<sup>1</sup> For method of proving the non-access, see *Page v. Denison*, 1 Grant (Pa.), 377; *Dennison v. Page*, 29 Pa. 420; *Stegall v. Stegall*, 2 Brock, 256; *S. v. Herman*, 2 Ire. 502.

<sup>2</sup> *Baker v. Baker*, 13 Cal. 87.

<sup>3</sup> *Long v. Long*, 77 N. C. 304.

<sup>4</sup> *McCulloch v. McCulloch*, 69 Tex. 682, 7 S. W. 593.

<sup>5</sup> See Fielding's Case, Burke's Celebrated Trials, 63, where a second marriage was annulled. Fielding had married a woman by mistake, supposing he had won the hand of a rich widow, while in

reality the girl he married was without fortune. He repudiated this marriage and married the Duchess of Cleveland. Mr. Bishop says of this case: "It would be fair to say that though Fielding did not get possession of the particular rich widow whom he was seeking, he did obtain the very flesh and blood he courted and over which he poured his protestations and sighs. And as he was himself playing a game of fraud, pretending to have his heart on the person, while it was really on her supposed

arise without sufficient fraud to render the marriage voidable. The error or mistake of fact must be in regard to some capacity for marriage and essential to it. Since misrepresentations as to wealth, chastity, health, character and other personal qualities will not render the marriage voidable, a mistake of fact as to such qualities will not. On familiar principles a mistake of the law will not entitle the party to relief, since all are conclusively presumed to know it.<sup>1</sup> But where a party is entrapped into a marriage ceremony valid in form, under the belief that it is to be a mock marriage and not to be consummated until a public ceremony is performed, and the parties do not assume the marital relation, the marriage is void. Here the ignorance of the law is not unmixed with fraud and mistake of fact.<sup>2</sup>

**§ 617. Duress — In general.**— This cause for divorce or nullity is similar to fraud, in that the consent of one of the parties is not fairly and freely obtained. Duress affecting the validity of a marriage is the unlawful constraint or threatened danger which deprives the party of the exercise of his free will and extorts a verbal consent to the marriage. The duress need not be the fear of bodily harm, of violence or of death. The fear of loss of property, public disgrace or of imprisonment is sufficient if the will of the party is overcome by such fear, and he feels compelled to enter into the ceremony as the only means of escaping from the persons who unlawfully restrain or threaten him. Duress may consist of threats alone without any efforts to execute them. Thus, where the relatives of a woman threaten to murder a man unless he will marry her, his consent, if obtained while in such fear, is not the free consent necessary to a valid marriage. But where such threats do not disturb him and he has an opportunity to escape if he so desires, and other motives were probable, the marriage is valid.<sup>3</sup>

wealth, he was hardly in a position to complain when outwitted therein." See, also, *Farquharson v. Farquharson*, 3 Ad. Ec. 282.

<sup>1</sup> *Cooper v. Crane*, 1891 Probate, 367; *Clark v. Field*, 13 Vt. 460.

<sup>2</sup> *Clark v. Field*, 13 Vt. 460.

<sup>3</sup> *Todd v. Todd*, 149 Pa. 60, 24 A.

Since threats of a lawful prosecution may be duress which will avoid a contract obtained thereby,<sup>1</sup> it may be a disputed question whether a criminal prosecution may be threatened. In reason it would seem that a consent is not obtained under duress where the party yields in consideration of all the consequences which usually follow a refusal to marry a seduced woman. And if this is true, any threat not beyond the plain truth may be lawfully made. Expostulations of the woman's friends and their refusal to any delay, threats of public disgrace to both the parties of the marriage, and the probability of lynching by others in the community, have been considered insufficient duress, where the man procures the license and voluntarily goes to the house where the ceremony is performed.<sup>2</sup>

**§ 618. What duress is sufficient.**—Like fraud and deception, duress is to be judged by its effect upon the complainant under the circumstances. It must be sufficient to overcome the will and prevent voluntary action. And it need not have been sufficient to have moved a person of ordinary courage. To rule that the constraint would have been insufficient to have moved a person of ordinary firmness is to impose penalties upon the weak because they are so, and to ignore common principles of equity. A recent English case denied the doctrine that, to avoid a contract on account of duress, the fear must be such as would impel a person of ordinary courage and resolution to yield to it. "I do not think it is an accurate statement of the law," said the court. "Whenever from natural weakness of intellect or from fear — whether reasonably entertained or not — either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger."<sup>3</sup> This sound doctrine is now generally accepted. For instance,

<sup>1</sup> *Haynes v. Rudd*, 30 Hun, 239.

<sup>3</sup> *Scott v. Seabright*, 12 P. D. 21

<sup>2</sup> *Honnott v. Honnott*, 33 Ark.

a designing woman who is pregnant and desirous of a speedy marriage to avoid giving birth to a child that would otherwise appear illegitimate, selects an innocent boy of sixteen or eighteen years, and by threats and a bastardy proceeding, and some assistance from the officers, induces him to marry her. Others knowing themselves innocent of any connection with her would have hesitated to marry a woman of the town, and would have disregarded the threats and importunities, and awaited vindication on the trial of the case. Here the youth and inexperience of the boy are to be considered, and the marriage will be declared void if he consented under such duress.<sup>1</sup>

Marriage is a *status* of great public importance. It is unlike an ordinary contract obtained by duress, in that pecuniary loss may result from the enforcement of the contract, but vastly greater evils may flow from a decree declaring a marriage valid when there has been some constraint and force employed. It may force the man to maintain a woman for whom he has the most profound contempt and hatred, and may compel a disgraced woman to wear the name of one for whom she entertains like sentiments. A suit to annul a marriage obtained by duress is always a suit for property rights, unless one party desires to be relieved from the marriage in order to marry another. Should a decree be refused, the parties will remain apart, their bitterness increased by the contest in court. Other evils are easily suggested. In fact, no good can follow the refusal of a decree, except where a child is born from ante-nuptial pregnancy. Evils like these suggest the advisability of a departure from the doctrine of duress as applied to contracts. It may be safely stated, however, that any duress sufficient to avoid an ordinary contract will render the marriage voidable.<sup>2</sup>

<sup>1</sup> *Shoro v. Shoro*, 60 Vt. 268, 14 A. 177; *Smith v. Smith*, 51 Mich. 607.

<sup>2</sup> *Scott v. Seabright*, 12 P. D. 21. In Browne on Divorce it is laid down that "There must be actual compulsion; hence it will not suffice that a party married unwillingly; he must have been forced by fear of bodily harm." Citing *Stevenson v. Stevenson*, 7 Philadelphia, 386.

A young woman of some wealth had assisted a young man by accepting some bills for his accommodation. These came due, and, he being unable to meet them, his creditors threatened her with bankruptcy proceedings. These threats caused her such great anxiety as to greatly impair her health and endanger her reason, leaving her in such a state of mental prostration as to incapacitate her to resist any restraint or force. At a meeting of her creditors it was insisted that she meet them on the next day, and upon going to the place the young man took her in a carriage to a place where the marriage ceremony was performed. Here he told her the only way out of the difficulty was to marry him, and threatened to shoot her if she showed any resistance before the officer. In great agitation of mind she performed her part of the ceremony, but never consummated the marriage. The court held that she had not given her consent and the marriage was annulled.<sup>1</sup>

**§ 619. Unlawful arrest or imprisonment.**—If the man marries to escape an unlawful custody, fear of great bodily harm or death, and escapes as soon as the restraint is removed, and there is no consummation, the marriage will be annulled.<sup>2</sup> An arrest is considered unlawful in this sense when it is malicious or without probable cause.<sup>3</sup> It is not probable that a marriage will be annulled for duress because the process was void, unless the complainant shows that he is innocent of any illicit intercourse, and the fear under which his consent was obtained was due wholly to his fear of unlawful arrest or imprisonment. It is clear that the marriage should not be annulled because the arrest or imprisonment was unlawful for some technical reason, where it is not denied that the complainant was guilty of illicit intercourse. An arrest without a warrant is clearly unlawful in bastardy proceedings; and where the party is induced to

<sup>1</sup> Scott *v.* Seabright, 12 P. D. 21.      <sup>3</sup> Collins *v.* Collins, 2 Brewster, See, also, Fulwood's Case, Cro. Car. 515; Stevenson *v.* Stevenson, 7 482. Phila. 386; Marvin *v.* Marvin, 52

<sup>2</sup> Bassett *v.* Bassett, 9 Bush, 696. Ark. 425.

marry under such proceedings, and is innocent of illicit intercourse with the woman, the marriage will be declared void.<sup>1</sup> When an unlawful arrest is shown, the coercion is not a necessary and unavoidable conclusion. To prove duress of imprisonment it must appear that the party acted involuntarily and under unlawful restraint.

**§ 620. Marriage under arrest.**—Where a man has seduced a woman and he has been arrested on a process for seduction or bastardy, or other lawful proceeding arising out of the wrong he has inflicted, his consent to marry, given while under such arrest, is not obtained under duress.<sup>2</sup> He is responsible for the wrong and has a choice of two evils: either to marry the woman or to await the result of the pending suit. He should not escape all liability by first taking the woman as his wife, having the prosecution dismissed and then have the marriage annulled. The arrest being lawful and in the enforcement of legal rights is not alone such duress as to prevent a voluntary consent to the marriage. Where a man supposes a woman to be pregnant from their illicit intercourse and furnishes her the drugs necessary to produce an abortion, and criminal proceedings are lawfully instituted against him with a view to punish him for the offense, the restraint which results from his own conduct is not duress, nor does it constitute a ground, either in law or morals, for annulling the marriage.<sup>3</sup>

**§ 621. Threats of arrest and imprisonment.**—In persuading a man to marry a woman with whom he has had illicit intercourse, threats of arrest for bastardy which over-

<sup>1</sup> Brant *v.* Brant, 41 Leg. Int. 54; *v.* Marvin, 52 Ark. 425, 12 S. W. 875; James *v.* Smith, reported 1 Bishop, Lacoste *v.* Gurdroz, 16 So. 836; Mar., Sep. & Div., § 544. Copeland *v.* Copeland (Va.), 21 S. E.

<sup>2</sup> Sickles *v.* Carson, 11 C. E. Green, 241.

440; Williams *v.* S., 44 Ala. 24; S. *v.* Davis, 79 N. C. 603; Johnson *v.* Johns, 44 Tex. 40; Medrano *v.* S. (Tex.), 22 S. W. 684; Dies *v.* Winnie, 7 Wend. 47; Schwartz *v.* Schwartz, 29 Ill. Ap. 516; Marvin

<sup>3</sup> Frost *v.* Frost, 42 N. J. Eq. 55, 6 A. 282. The fact that this is purely a criminal proceeding, in no way looking to the care and support of the child, is not material.

come his will and induce him to marry would not render the marriage void for duress, since the threat, if executed, would not have that effect. Threats made by relatives of the parties may be considered although the woman is not in any way a party to such threats. Where a man is forced to marry a woman with whom he has had no intercourse, and his consent is obtained through the threats of others, or of the officers of a court having jurisdiction of the offense, such threats will have the same effect as an unlawful arrest or imprisonment.

**§ 622. Duress from other parties.**—It is immaterial from what source the threats emanate, or who is the active instigator of the proceedings at law which constitute the duress.<sup>1</sup> If others have so frightened the complainant that his consent is involuntarily given—"a yielding of his lips, but not of his mind"—the marriage is voidable for want of consent. If the woman was ignorant of the actions of her friends in procuring his consent by duress, this would not render the marriage valid. The lack of consent is vital in all cases of duress, and therefore the complicity of the other party or her ignorance of the duress is immaterial.<sup>2</sup> Thus, where the woman had assented to a postponement of the ceremony, to which complainant had not yet consented, and he was forced into the marriage by the threats and importunities of the justice of the peace, the minister and the officer who had complainant in charge, the question to be determined was whether his consent was extorted, and if it was the marriage should be annulled although no conspiracy is proven.<sup>3</sup>

<sup>1</sup> *Marks v. Crume* (Ky.), 29 S. W. 436.

<sup>2</sup> See *contra*, *Sherman v. Sherman*, 20 N. Y. Supp. 414; *Schwartz v. Schwartz*, 29 Ill. Ap. 516.

<sup>3</sup> *Sayer v. Sayer*, 37 N. J. Eq. 210. Threats by relatives of the woman that they would kill the plaintiff unless he married the defendant is sufficient duress to avoid the marriage when there has been no consummation, although the threats were communicated to plaintiff by a priest who undertook to induce the plaintiff to marry. *Anderson v. Anderson*, 74 Hun, 56, 26 N. Y. Supp. 492.

**§ 623. Effect of consummation.**—Consummation of the marriage by the man is a complete bar to his complaint of duress, for he cannot explain his ratification as being a part of the restraint.<sup>1</sup> But the woman is not barred by her involuntary consummation. All that is required of her is that she withdraw from the man as soon as his restraint is removed. With one or two exceptions in the cases noticed under this subject the parties refused to consummate the marriage, but, as usual in cases of duress, submitted to the ceremony without the intent to enter into the marriage relation.

**§ 624. Pleading and evidence.**—The form and rules of pleading fraud, error or duress in the marriage contract are substantially the same as in ordinary contracts, and require no special notice.<sup>2</sup> The burden of proof and the weight of evidence is the same as in actions where the plaintiff is seeking to avoid a contract on the ground of fraud or duress.<sup>3</sup>

<sup>1</sup> See *Schwartz v. Schwartz*, 29 Ill. Ap. 516.

mation as a defense to a marriage alleged to be void on account of duress must be specifically alleged.

*Miller v. Miller*, 21 S. E. 254.

<sup>2</sup> See forms in *Hoffman v. Hoffman*, 30 Pa. 417; *Schiver v. Schiver*, 18 W. N. C. 144. For form of petition in case of duress see *Brant v. Brant*, 17 Phila. 655. Consum-

<sup>3</sup> *Montgomery v. Montgomery*, 3 Barb. Ch. 132; *Dawson v. Dawson*, 18 Mich. 335.

## INSANITY AND MENTAL INCAPACITY.

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**§ 650. In general.**—A valid contract of marriage requires the mutual consent of two persons of sound mind. If at the time of the marriage one of the parties was mentally incapable of giving an intelligent consent to what was done, the solemnization is a mere idle ceremony, conferring no right, and leaving the *status* of both parties unchanged. The mental incapacity which prevents a valid consent may arise from any form of mental derangement or weakness; so this chapter treats of mental weakness and drunkenness as well as insanity. [Whatever the form of mental derangement, the same degree of mental capacity is required, viz.: the ability to understand the nature of the marriage contract.] While this rule is easily stated it is very difficult to apply it to the facts of a case. Mental diseases are not as capable of direct diagnosis as physical diseases, and the condition of the mind must be inferred from words, acts and

symptoms. This kind of evidence is satisfactory only when it shows that all the faculties of the mind are clouded. When there is an insane delusion it is difficult to ascertain its effect upon certain faculties of the mind. If the faculties required to understand the contract are diseased, the party is then incapable of marriage, but might be able to make a will or transact some kinds of business. It is also difficult to define the essentials of the marriage contract which it is absolutely necessary for a party to understand. It is clear that no person, however learned in science or law, can comprehend the nature of the marriage contract in its fullest sense. So great are the variations of human character and conduct, so complex are the legal rights of husband and wife, and so undefined are the laws of sex, that marriage, and the probable consequences which flow from it, may well be classed among the uncertain things of this life. Yet parties who enter the relation must be capable of knowing the principal duties that will be required of them. Some attempt has been made to determine what these duties are.

[The state has no interest in preserving the marital relation where one of the parties is tainted with hereditary insanity.] It has, in fact, a direct interest in prohibiting such marriages, because the issue may be insane and become a charge upon the state, as well as a menace to public safety. The rapid increase of the number of those afflicted with congenital insanity has suggested the advisability of prohibiting such marriages and forcibly separating the parties, and it seems that such measures would not be unconstitutional as an undue exercise of the police power of the state.<sup>1</sup> There is no doubt of the power of the state to make such insanity a cause for divorce in certain cases, for this would permit the dissolution of a marriage which the state has no interest in preserving.

**§ 651. Insanity as a cause for divorce.**—The Arkansas statute provides that a divorce may be granted “Where either party shall, subsequent to such marriage, have become

<sup>1</sup> Tiedeman, *Lim. Police Power.*

permanently or incurable insane." Such a cause for divorce has not been enacted in other states. Divorce for this cause should only be granted at the discretion of the court, as cases may arise where it would be unjust to dissolve the marriage. It may happen that no children were born, no affection ever existed between the parties, and that the insane person is a charge upon the state or has sufficient estate to support himself. In such case it would be an act of humanity to relieve the wife from a *status* the duties of which can never be performed. But if the court has no discretion in the premises, it may often happen that heartless and inhuman husbands and wives will find this cause for divorce a ready means to cast aside all fidelity to their unfortunate partners, obtain their property and marry again.

The statute of Washington very wisely provides that "The court may, in its discretion, grant a divorce in case of incurable chronic mania or dementia of either party, having existed for ten years." This act has been held valid and within the power of the territorial legislature under the organic act, and not unconstitutional as being contrary to public policy.<sup>1</sup>

**§ 652. Post-nuptial insanity.**—Evidence that the party was insane immediately after marriage is admissible to show that the party continued to be unable to give an intelligent consent to the marriage. But post-nuptial insanity was not a cause for divorce or annulment of marriage at common law, nor is it a cause for divorce unless by express provision of the statute.<sup>2</sup> It cannot affect the validity of the

<sup>1</sup> *Hickman v. Hickman*, 1 Wash. 187; *Lloyd v. Lloyd*, 66 Ill. 87; 257, 24 P. 445. In Wisconsin insanity after marriage was a cause for divorce where the plaintiff gave security for support of defendant so long as the insane party should live. This act was repealed in 1882. See *Hicks v. Hicks*, 79 Wis. 465, 48 N. W. 495.

<sup>2</sup> *Hamaker v. Hamaker*, 18 Ill.

marriage, because the parties were capable of giving their consent at the time of the marriage.<sup>1</sup>

**§ 653. Not mere mental unsoundness.**—[Proof of mere mental unsoundness is not sufficient. There may be, however, such acute disease as to destroy all the faculties and powers of mind.] At one time there was a doctrine in England that if the mind is unsound in any respect the act of the incapable party is void. This rule was laid down in *Waring v. Waring*,<sup>2</sup> where Lord Brougham, in an elaborate opinion, said: “If the mind is unsound on one subject, providing that unsoundness is at all times existing upon that subject, it is erroneous to suppose such mind is really sound on other subjects; it is only sound in appearance; for if the subject of the delusion be presented to it, the unsoundness would be manifested by such a person believing in the suggestions as if they were realities; any act, therefore, done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind.”

Later this rule was applied in an action to annul a marriage where the form of insanity was intermittent, and the woman was sane during part of the time, but there was strong evidence of a mental disease which would terminate in permanent insanity. It was said: “The court has not here, as in many testamentary cases, to deal with varieties and degrees in strength of mind, with the more or less failing condition of intellectual power in the prostration of illness, or the decay of faculties in advanced age. The question here is one of health or disease of mind, and if the proof shows that the mind was diseased, the court has no means of gauging the extent of the derangement consequent upon that disease, or affirming the limits within which the disease might operate to obscure or divert the mental power.”<sup>3</sup> This doctrine was subsequently carried to its logical conclu-

<sup>1</sup> *Forman v. Forman*, 24 N. Y. <sup>3</sup> *Hancock v. Peaty*, 1 P. & D. Supp. 917. 335.

<sup>2</sup> 6 Moo. P. C. 341 (1848).

sion, and it was held that a person who is affected by monomania, although sensible or prudent on other subjects, is not in law capable of making a will.<sup>1</sup> The doctrine of the Waring case is no longer accepted in England. In 1879 it was said: "A few years ago it was generally considered that, if a man's mind was unsound in one particular, the mind being one and indivisible, his mind was altogether unsound, and therefore that he could not be held capable of performing rationally such an act as the making of a will. A different doctrine subsequently prevailed, and this I propose to enunciate for your guidance. It is this: If the delusions could not reasonably be convinced to have had anything to do with the deceased's power of considering the claims of his relations upon him and the manner in which he acted, then the presence of a particular delusion would not incapacitate him from making a will."<sup>2</sup> The doctrine of the Waring case does not seem to have found much favor in American courts and has been expressly repudiated.<sup>3</sup>

**§ 654. The test of business ability.**—In the first decisions on questions of insanity the law was contradictory and not very satisfactory to any reasonable doctrine. The nature of mental phenomena and diseases was not well settled, although it was beginning to be believed that some forms of insanity would yield to medical treatment. The presence of insanity was taken as proof that the whole mind was disordered, and therefore it was held that if a party could enter into a contract, or care for his estate, he had capacity to enter into any kind of agreement.<sup>4</sup> And at one time the

<sup>1</sup>Smith *v.* Tebbetts, 1 P. & D. 398. Some *dicta* to the same effect appear in McDonald *v.* McDonald, 14 Grant's Ch. 545; Cook *v.* Parker, 4 Phil. 265; Vensell *v.* Chancellor, 5 Whart. 371. But see McDonald *v.* McDonald, 16 Grant's Ch. 37; Beals *v.* See, 10 Pa. St. 56; Lancaster Co. Bank *v.* Moore, 78 Pa. St. 407.

<sup>2</sup>Smee *v.* Smee, 5 P. D. 84. See, also, Jenkins *v.* Morris, 14 Ch. D. 674; Banks *v.* Goodfellow, 5 Q.B. 549.

<sup>3</sup>Dennett *v.* Dennett, 44 N. H. 531; Boardman *v.* Woodman, 47 N. H. 120; Frazer *v.* Jennison, 42 Mich. 206; Benoist *v.* Murrin, 58 Mo. 304; Denson *v.* Beasley, 34 Tex. 191.

<sup>4</sup>In Browning *v.* Reane, 2 Phillim.

American authorities were uniform that the true test of insanity in this kind of action was the ability to enter into a contract or transact business.<sup>1</sup> This is what may be called a general test, and proceeds upon the unsound presumption that the ability required to make one contract is sufficient for all contracts. This test ignores the fact that different faculties and degrees of mental power are required in making the different kinds of contracts. It was once thought that ability to make a contract was sufficient, since a less capacity was required to contract marriage.<sup>2</sup> In an English case an opposite view is taken, and it is said that "if any contract more than another is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage,—an act by which the parties bind their property and their persons for the rest of their lives."<sup>3</sup>

Such comparisons are not pertinent. The law aims to find the ability of the party to make the particular contract at the time it was entered into. It tries by a special test for each case to discover whether the alleged insane is such in respect to the particular question which is being investigated. A monomaniac may be unsound in one respect and

69, Sir John Nicholl held that "if the incapacity be such that the party is incapable of understanding the nature of the conduct itself, and incapable from mental imbecility to take care of his or her own person and property, such an individual cannot dispose of his or her person and property by the matrimonial contract any more than by any other contract." And Lord Stowell held that it must be something that affects a party's "general fitness to be trusted with the management of himself and his own concerns." *Turner v. Meyers*, 1 Hag. Con. 414.

<sup>1</sup> Anonymous, 4 Pick. 82; Cole *v.*

Cole, 5 Sneed, 57; Middleborough *v. Rochester*, 12 Mass. 363; *Page on Divorce*, 192; *Atkinson v. Medford*, 46 Me. 510; *Foster v. Means*, 1 Speer (N. C.), 569.

<sup>2</sup> *Ex parte Glen*, 4 Des. 546. In this case it was said that "there may possibly be so much imbecility as to render her incapable of making contracts which would bind her estate, but this imbecility does not appear to exist in so great a degree as to incapacitate her from contracting marriage, which seems to be the chief object of the petitioner."

<sup>3</sup> Lord Penzance in *Hancock v. Peaty*, 1 P. & M. 335.

not in all others. He may have "mental competency to make one contract and not another."<sup>1</sup> The test of business ability is not, therefore, a correct test of ability to enter into the marriage contract.

**§ 658. Ability to understand the nature of the marriage contract.**—In a suit to annul a marriage on the ground that one of the parties was insane and therefore incapable of consenting to the marriage, different tests of insanity have been applied. [But the most reasonable test is believed to be the ability to understand the nature of the marriage contract and not the ability to enter into ordinary contracts or to make a will.] So various are the forms and degrees of mental unsoundness that the party may be able to act intelligently in one transaction and be utterly unable to understand the nature of another transaction. It is impractical to apply the same tests to actions which require different powers of mind. The law recognizes the fact that there may be derangements of mind as to particular subjects, and yet capacity to act on other subjects. Proof of insanity does not establish incapacity in every respect. In order to invalidate a man's act it must be shown that the insanity was such as to prevent rational thought and reasonable judgment in regard to the very act in controversy. Monomania does not pervert all the faculties of the mind. A person subject to an insane delusion is not incompetent to make a will, unless such delusion is one affecting and incapacitating him as a testator. The deed of a monomaniac is valid when his monomania did not affect his business capacity in this respect. And so with the marriage contract; the alleged insane person may be able to understand the nature of such contract and to give intelligent consent to it, and yet be incapable of criminal intent or without ability to transact business. Therefore the true test, in actions to annul a marriage on account of insanity at the time of the marriage, is whether the party was capable of understanding the respon-

<sup>1</sup> *St. George v. Biddleford*, 76 Me. 593.

sibilities assumed by marriage. This test is applied in all the recent and well considered cases, both English and American.<sup>1</sup>

**§ 659. To what extent must the nature of the marriage contract be understood.**—We have seen that the test of mental capacity to enter the marital relation is the *ability to understand the nature of the marriage contract*. This expression needs some further explanation. It certainly does not require the contracting parties to comprehend all the complications of property rights which may follow marriage, for such test would require a legal education. And for the same reason the parties need not be able to enumerate the causes for dissolution of the marriage which they are about to enter, or the laws of nature concerning the procreation of children, and the probability of the children of the marriage being subject to hereditary insanity. Nor need there be any ability to apprehend any other consequences of marriage which require special knowledge or even a common education. For the most illiterate person, even a savage, can have the required understanding. The question then arises, what understanding is required? It is not possible that any satisfactory formula can be given that will contain the few essentials absolutely required. In the law of wills the mental capacity has been thus described: "A person of sound mind, within the meaning of the law in this case, is one who has full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons he desires shall be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty; but it is not necessary that he should have sufficient capacity to make contracts and do business generally, nor to engage in com-

<sup>1</sup> *Kern v. Kern* (N. J. Eq.), 26 A. ford, 76 Me. 593; *Cannon v. Smalley*, 837; *Lewis v. Lewis*, 44 Minn. 124, 10 P. D. 96; *Hunter v. Edney*, 10 46 N. W. 323; *Durham v. Durham*, P. D. 93.  
10 P. D. 80; *St. George v. Biddle-*

plex and intricate business matters."<sup>1</sup> This was given as an instruction to a jury and held correct on appeal. It seems to be a fair enumeration of the mental powers that should be required of a testator. A similar definition of the mental capacity to contract marriage has been thought impractical and unwise.<sup>2</sup> It is simply a difficult, but not impossible, task, to enumerate the essentials of the marriage contract that must be understood before a valid marriage can be entered into. A person understands the nature of the marriage contract who knows that marriage is an agreement between a man and a woman to love each other, to live together as husband and wife, in mutual dependence, for life, unless grave causes justify their divorce. No person can understand the nature of the marriage contract unless he or she is rational enough to know the other party and is able to contemplate marriage with such other, to entertain some affection for the other, and to desire a union for life. These simple requirements are to be taken into consideration with the knowledge of the incapable party of his surroundings, his financial ability and other facts.

**§ 660. Insane delusion.**—We have seen that mere mental unsoundness does not invalidate the act of the party, or render him incapable in law of doing any valid act. It is now well established that one possessed of an insane delusion may be capable of transacting business, the subject-matter of which is not within the scope of his peculiar derangement.<sup>3</sup> It now remains to inquire into the nature and

<sup>1</sup> *Meeker v. Meeker*, 74 Ia. 352, 37 N. W. 773, citing *Bates v. Bates*, 27 Ia. 110; Will of Convey, 52 Ia. 197.

<sup>2</sup> In *Elzey v. Elzey*, 1 Houst. 308, it is said: "It would be dangerous, perhaps, as well as difficult, to prescribe the precise degree of mental vigor, soundness and capacity essential to the validity of such an engagement; which, after all, in many cases depends more on senti-

ments of mutual esteem, attachment and affection, which the weakest may feel as well as the strongest intellects, than on the exercise of a clear, unclouded reason, or sound judgment, or intelligent discernment and discrimination, and in which it differs in a very important respect from all other civil contracts."

<sup>3</sup> *Smee v. Smee*, 5 P. D. 84.

effect of insane delusions. A delusion is a spontaneous conception of the mind which has no existence except in the imagination, and which the party believes against all evidence to the contrary. In a modern case the delusions were a constant and unreasonable fear of personal violence; a belief that the party had certain diseases, and a conception that he could see inside of the bodies of others.<sup>1</sup> The first two delusions were thought to be too common among intelligent persons to be any indication of diseased intellect, and the last delusion, while evidence of great mental weakness or disease, was not of such a nature as to preclude a proper understanding of the contract of marriage.<sup>2</sup> It is not probable that a belief in modern spiritualism would indicate an incapacity to understand the responsibilities of the marriage relation. It is not considered evidence of mental unsoundness.<sup>3</sup> Kleptomania, or a morbid propensity to steal, whether a form of mental weakness or a disease, is not such mental unsoundness as to render the party incapable of assenting to the contract of marriage.<sup>4</sup> The special test in all classes of insane delusion or monomania is now held to be this: Did the person whose act is questioned possess sufficient ability to understand the transaction in a reasonable manner? If so, the act is valid.<sup>5</sup> If a will is the direct offspring of the

<sup>1</sup> *Kern v. Kern* (N. J. Eq.), 26 A. Phila. 244; *Lee v. Lee*, 2 McCord, 837.

<sup>2</sup> *Id.*

<sup>3</sup> *Cont. Ins. Co. v. Depeuch*, 82 Pa. 225; *Middleditch v. Williams*, 45 N. J. Eq. 726; *La Bau v. Vanderbilt*, 3 Redf. (N. Y.) 384; *Matter of Keeler*, 12 N. Y. St. Rep. 148.

<sup>4</sup> *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323. The belief in witchcraft will not render a testator incompetent. *Kelly v. Miller*, 39 Miss. 17; *Van Guysling v. Van Kuren*, 35 N. Y. 70; *Addington v. Wilson*, 5 Ind. 137; *Matter of Veder*, 6 Dem. 92; *Leech v. Leech*, 1

Phila. 244; *Lee v. Lee*, 2 McCord, 183; *Johnson v. Johnson*, 10 Ind. 387; *Woodbury v. Obear*, 7 Gray, 467. Nor will peculiar views as to the state of future existence, for

this is a question not of accurate knowledge, but of faith. *Austin v. Graham*, 1 Spinks, 357; *Bonard's Will*, 16 Abb. Pr. (N. S.) 128; *Weir's Will*, 9 Dana, 484; *Gass v. Gass*, 3 Humph. 278; *Denson v. Beasley*, 34 Tex. 191.

<sup>5</sup> *Davern v. White*, 42 N. J. Eq. 569, 7 A. 682; *Eaton v. Eaton*, 37 N. J. L. 108; *Blakeley v. Blakeley*, 33 N. J. Eq. 502.

partial insanity or monomania under which the testator is laboring, it is invalid, although he may have been sane as to all other subjects.<sup>1</sup> In conformity to these rulings, the special test of insanity, in actions where the validity of the marriage is tested, is whether the party was capable at the time of understanding, in a reasonable manner, the nature of the marriage contract; or whether the insane delusion was such as to cloud the mind with reference to such contract.<sup>2</sup>

**§ 661. Lucid interval.**—Any contract entered into during a lucid interval was not voidable at common law or the civil law, although the party may have been insane before and after such interval.<sup>3</sup> And this is true of the marriage contract.<sup>4</sup> If the insanity is temporary and in the incipient stage, the marriage will be presumed to have taken place during a lucid interval, and insanity at the time of marriage must be proved.<sup>5</sup> But a permanent form of insanity once shown is presumed to continue, and if the proof shows that the derangement was present after the marriage, the incapacity will be presumed, and the burden shifts upon the other party to prove that the celebration occurred during the lucid interval.

**§ 662. Hereditary insanity.**—The fact that other members of the family of the alleged insane had been of unsound mind was at one time considered inadmissible in either civil or criminal cases.<sup>6</sup> But science having shown how material such fact may be in investigating the nature and extent of insanity, our courts have abandoned that rule of evidence

<sup>1</sup> Redfield on Wills; Denson *v.* Beasley, 34 Tex. 191; Middleditch

<sup>4</sup> Turner *v.* Meyers, 1 Hag. Con. 414.

*v.* Williams, 45 N. J. Eq. 726; Townsend *v.* Townsend, 7 Gill, 10; Smith *v.* Smith (N. J. Eq.), 25 A. 11; Jenkins *v.* Morris, 14 Ch. Div. 674; Blakeley's Will, 48 Wis. 294, 4 N. W. 337. *Contra*, Waring *v.* Waring, 6 Moore P. C. 341.

<sup>5</sup> Smith *v.* Smith, 47 Miss. 211; Scott *v.* Paquet, 17 Lower Can. Rep. 283; Goodheart *v.* Ransley, 28 Weekly Law Bul. 227.

<sup>2</sup> Slais *v.* Slais, 9 Mo. Ap. 96.

<sup>6</sup> Meeker *v.* Meeker, 75 Ill. 260; McAdam *v.* Walker, 1 Dow. 148; Hugan *v.* S., 5 Baxter (Tenn.), 615; Doe *v.* Whitefoot, 8 C. & P. 270.

<sup>3</sup> Bushwell on Insanity, 843.

as unphilosophical and unsound, and now hold that evidence of insanity of either parent, or even of a remote ancestor, is competent upon the issue of insanity.<sup>1</sup> The usual method of introducing such evidence is to first show the presence of symptoms of insanity, and then the insanity of the ancestor becomes admissible. This question is not discussed in the reports of actions to annul marriages on the ground of insanity; such evidence seems to have been admitted in most of the cases without objection. Such fact is considered by the courts as a minor fact tending to establish insanity, and as not entitled to any great weight, since a party may have congenital insanity and yet be perfectly lucid for years at a time. The mere presence of the taint of hereditary insanity which is manifested by occasional paroxysms is not a cause for annulling the marriage.<sup>2</sup>

**§ 663. Other forms of mental incapacity.**—No aid can be derived from a discussion of the various forms of mental unsoundness, weakness or disease. The same special test should be applied to all the various shades of derangement, namely, the ability to understand the nature and consequences of entering the marital relation.<sup>3</sup>

**§ 664. Marriage while drunk.**—The test applied in cases of alleged insanity at marriage should be applied to that mental state called intoxication. A marriage celebrated while the party is intoxicated to the extent of great mental disturbance is not voidable unless the party was incapable of knowing the nature of the marriage contract and that he was

<sup>1</sup> *People v. Garbutt*, 17 Mich. 10; *v. Reane*, 2 Phillim. 69; *Birdsong People v. Smith*, 31 Cal. 466; *Bradley v. S.*, 31 Ind. 492; *Luros v. Com.*, 84 Pa. 200. *v. Birdsong*, 2 Head, 289; *Cartwright v. Cartwright*, 1 Phillim. 90; *Johnson v. Kincade*, 2 Ired. Eq.

<sup>2</sup> *Smith v. Smith*, 47 Miss. 211; 470. *Ackley v. Stephens*, 8 Ind. 411; *Hamaker v. Hamaker*, 18 Ill. 187. As to ability of deaf and dumb to understand nature of contracts,

<sup>3</sup> *Doe v. Roe*, 1 Edm. Sel. Cas. (N. Y.) 344; *In re Vanauken*, 10 N. J. Eq. 186; *Smith v. Smith*, 47 Miss. 211; *Portsmouth v. Portsmouth*, 1 Hag. Eq. 355; *Browning* see *Dickenson v. Blisset*, 1 Dick. 268 (1754); *Harrod v. Harrod*, 1 Kay & J. 4; *Brower v. Fisher*, 4 Johns. Ch. 441.

performing the ceremony.<sup>1</sup> The proof of mental incapacity should be clear to invalidate a marriage where a party has deliberately planned the occasion, made all necessary preparations for it, and in other ways showed a determination to bring about the marriage which he now seeks to avoid. No case is reported where such marriage was declared void. Other elements, such as fraud, conspiracy or mental weakness, must be shown in such case. Some assistance may be derived from an examination of cases where the validity of wills and contracts has been contested on the ground of mental incapacity arising from drunkenness or delirium tremens, but it should be borne in mind that the ability to enter into a contract or make a will is not an exact test of the ability to understand the nature of the marriage contract.<sup>2</sup> Thus a marriage is valid where the husband is suffering from attacks of delirium tremens, if the marriage took place during a lucid interval, and the alleged incompetent party was able to discuss and arrange the terms of a marriage agreement.<sup>3</sup>

**§ 665. Suicide.**—The mere fact of self-destruction raises no presumption of insanity.<sup>4</sup> A person may commit suicide and be rational as to everything else. The act itself is not inconsistent with the idea of a sound mind. The act occurring shortly after the marriage in question is, of course, ad-

<sup>1</sup> *Elzey v. Elzey*, 1 Houst. (Del.) 308; *Roblin v. Roblin*, 28 Grant (U. Canada), 439; *Clement v. Mattheson*, 3 Rich. Law (S. C.), 93; *Johnson v. Brown*, 3 Scotch Sess. Cas. 437; *McCreery v. Barcalow*, 6 Ohio Cr. Ct. R. 481.

<sup>2</sup> *Dixon v. Dixon*, 22 N. J. Eq. 91; *Menkins v. Lightner*, 18 Ill. 282; *Jenness v. Howard*, 6 Blackf. (Ind.) 940; *Wheeler v. Alderson*, 3 Hag. Ec. 574; *Sill v. McKnight*, 7 Watts & S. (Pa.) 244; *Hutchinson v. Tindall*, 3 N. J. Eq. 357; *Clifton v. Davis*, 1 Parsons (Pa.), 31; *Woods v. Pin-*

*dal, Wright*, 507; *Cummings v. Henry*, 10 Ind. 109.

<sup>3</sup> *Scott v. Paquet*, 17 Lower Can. Rep. 283.

<sup>4</sup> *Jones v. Gorham* (Ky.), 14 S. W. 599; *McElwee v. Ferguson*, 43 Md. 179; *Germain v. Brooklyn L. Ins. Co.*, 26 Hun, 604; *Duffield v. Morris' Ex'r*, 2 Har. (Del.) 375; *Brooks v. Barrett*, 7 Pick. 94; *McAdams v. Walker*, 1 Dow. 148; *Merritt v. Ins. Co.*, 55 Ga. 103; *Terry v. Ins. Co.*, 1 Dillon C. C. 403; *Pettitt v. Pettitt*, 4 Humph. 191; *Crum v. Thornley*, 47 Ill. 192.

missible in connection with other facts, but it does not alone create a presumption of insanity, although such act may be contrary to reason, education and natural instincts of self-preservation.

**§ 666. Burden of proof and presumptions.**—The burden of proof is always upon the party who attacks the validity of a marriage, for he must overcome a strong presumption that such marriage is legal and valid. Such presumption is one of necessity as well as of a sound public policy that protects the parties, their children and property from the evils which will result in declaring a marriage invalid. Mental capacity is also presumed, and the burden of proof is also on the party who seeks to avoid the marriage on the ground of insanity, so that there is a union of presumptions to overcome. There is another presumption, common to every department of law, that a condition or situation of things once shown is presumed to continue until the contrary appears. The presumption of continued insanity is weak where the alleged incompetent party was adjudged insane at a time remote from the time of marriage. If found insane shortly before the marriage, the presumption of continued insanity is sufficient, in the absence of rebuttal, to justify a finding that a party was insane at the time of the marriage. But if such person was adjudged insane three years before the marriage, the fact is too remote to create a presumption of continued insanity sufficient to overcome the two presumptions of validity of marriage and the mental capacity of the parties.<sup>1</sup>

**§ 667. Effect of previous finding of insanity by inquisition.**—The finding of a commission of lunacy is always admissible where such finding is not too remote. It is not, however, conclusive that the party was insane at the time of the marriage. But such finding is competent evidence of the fact, and is such *prima facie* proof as to raise the presumption that the party was insane and continued to be while the commission continued.<sup>2</sup> The party will be pre-

<sup>1</sup> *Castor v. Davis*, 120 Ind. 231. 837; *Portsmouth v. Portsmouth*, 1

<sup>2</sup> *Kern v. Kern* (N. J. Eq.), 26 A. Hagg. 355; *Keys v. Norris*, 6 Rich.

sumed to be insane if the act in question occurred subsequently to the finding of the commission, or so nearly antecedent as to have been embraced in the inquiry of the commission.<sup>1</sup> The finding would, of course, affect the validity of a will which was executed during the time covered by the inquisition.<sup>2</sup> The finding is not conclusive upon the party because of its *ex parte* nature, and may be rebutted or avoided by proof that the party was always of sound mind, or had been insane but had recovered, or that the party, although often insane, acted during a lucid interval.<sup>3</sup> The fact that a commission has found a party incapable of transacting the ordinary affairs of life may not always determine the party's capacity to enter into the *status* and relation of marriage.<sup>4</sup> For a party may have an insane delusion which would be dangerous to others and justify his confinement in an asylum, and yet be capable of understanding the nature and effect of marriage; as where he has a delusion or fear of personal attack and carries arms for self-defense.<sup>5</sup>

Eq. 388; *Banker v. Banker*, 63 N. Y. 409; *Hunt v. Hunt*, 13 N. J. Eq. 161; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Hill v. Day*, 34 N. J. Eq. 150; *Mott v. Mott*, 49 N. J. Eq. 192, 22 A. 997; *Little v. Little*, 13 Gray, 264; *Crowninshield v. Crowninshield*, 2 Gray, 524. See, also, *Buswell on Insanity* (1885), 216, citing *Sergeson v. Sealy*, 2 Atk. 412; *Faulder v. Silk*, 8 Camp. (N. P.) 126; *Cooke v. Turner*, 15 Sim. 611; *Van Dusen v. Sweet*, 51 N. Y. 378; *Shumway v. Shumway*, 2 Vt. 339; *Rippy v. Gant*, 4 Ired. 448; *Christmas v. Mitchell*, 3 Ired. Eq. 535; *Armstrong v. Short*, 1 Hawks, 11; *Willis v. Willis*, 12 Pa. St. 159; *Gangwere's Estate*, 14 Pa. St. 417; *Lucas v. Parsons*, 23 Ga. 267; *Hassard v.*

*Smith*, 6 Ir. Rep. Eq. 429; *Hume v. Burton*, Ridgway, 204; *Gibson v. Soper*, 6 Gray, 279; *Titlow v. Titlow*, 40 Pa. St. 483; *Field v. Lucas*, 21 Ga. 447; *Stevens v. Stevens*, 127 Ind. 560, 26 N. E. 1078; *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 A. 826. See, also, *Stone v. Damon*, 12 Mass. 488; *Breed v. Pratt*, 18 Pick. 115.

<sup>1</sup> *Banker v. Banker*, 63 N. Y. 409.

<sup>2</sup> *Hughes v. Hughes*, 2 Mun. 209.

<sup>3</sup> *Prinsep v. Dyce*, 10 Moo. P. C. 232; *Titlow v. Titlow*, 40 Pa. St. 483; *Rider v. Miller*, 86 N. Y. 507; *Cook v. Cook*, 53 Barb. 180.

<sup>4</sup> *Garnett v. Garnett*, 114 Mass. 379.

<sup>5</sup> *Kern v. Kern* (N. J. Eq.), 26 A. 837.

**§ 668. Conduct at marriage ceremony.**— It is said that “the fact of a party’s being able to go through the marriage ceremony with propriety is *prima facie* evidence of sufficient understanding to make the contract.”<sup>1</sup> This might be true where there is no proof of insanity before the marriage. But where there is some evidence of insanity, the fact that the party knew the ceremony was being performed and acted with propriety is not entitled to much weight, for the insane may appear rational at times.<sup>2</sup> They may be able to take part in a mere ceremony without being able to understand the nature of the marriage contract.<sup>3</sup> The evidence is not restricted to the conduct of the party at the time of the marriage, but evidence of the mental condition of the party both before and after the ceremony is admissible.<sup>4</sup>

**§ 669. Deliberate preparations for marriage.**— There can be no better proof of sanity at the time of marriage than that the party made deliberate preparations for the marriage and for the support of his wife, and was able to execute his plans until the ceremony was performed. Such forethought is direct proof that he understood the nature and responsibility of the marriage relation and intelligently arranged his affairs accordingly. A marriage is therefore valid where the husband, though of weak intellect, and at times unable to express himself coherently, has mind enough to successfully manage his own estate, to purchase a house and furniture, to manage his engagement with some skill, to talk intelligently to the minister, to conduct himself with propriety during the ceremony, and to avail himself of his marital rights.<sup>5</sup>

<sup>1</sup> Anon., 4 Pick. 32.

Lee, 382 (1757), where a marriage

<sup>2</sup> Smith v. Smith, 47 Miss. 211.

was declared valid although the

<sup>3</sup> Browning v. Reane, 2 Phillim.

husband had a “weak understand-

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ing from his infancy, and by hard

<sup>4</sup> Nonnemacher v. Nonnemacher,  
159 Pa. 634.

drinking was at times lunatic, and  
did many mad and frantic acts, but

<sup>5</sup> Kern v. Kern (N. J. Eq.), 26 A.  
837. See, also, Parker v. Parker, 2

no commission of lunacy was taken  
out, nor was he constantly mad,

§ 670. **Affirming marriage.**—Although a marriage is voidable on account of the incapacity to consent while intoxicated, yet the party may consummate the marriage upon recovering from intoxication, and if he does so, such marriage is valid without a second ceremony.<sup>1</sup> And it is not disputed that a party who was insane at the time of marriage may, upon becoming sane, have the marriage declared void if no consummation has taken place.<sup>2</sup> But the authorities are not agreed as to the effect of a marriage of an insane person. It may be inferred from the expressions found in the early writers on common law that they considered such marriage absolutely void, and that “acquiescence, long cohabitation and issue, or the desire of the parties to adhere, cannot amend the original defect.”<sup>3</sup>

Nearly all of the older decisions assume that the marriage of an insane person is a mere nullity, incapable of ratifica-

but only by fits.” It appeared that he had no attacks of insanity about the time of the marriage, that he procured and paid for his license, and married with previous deliberation and intention.

<sup>1</sup> *Roblin v. Roblin*, 28 Grant (U.C.), 439.

<sup>2</sup> *Wightman v. Wightman*, 4 Johns. Ch. 343.

<sup>3</sup> *Poynter on Marriage and Divorce*, 157. See, also, *Brac. Abr.*, “Idiots and Lunatics;” *Smart v. Taylor*, 9 Mod. 98; *Ex parte Turing*, 1 Ves. & B. 140; *Co. Litt.* 33a. See statement of common law of this subject in *Wiser v. Lockwood*, 42 Vt. 720. The following *dicta* have been criticised as holding that such marriage could not be affirmed (see 1 *Bishop, Mar., Sep. & Div.*, § 616), but it seems that the court expressly avoids such holding. “In a case of alleged insanity at the time of marriage, subsequent ac-

quiescence, during long or frequent periods of undoubtedly restored reason, would be cogent proof of competent understanding at the time of the marriage; but assuming lunacy to then have existed, the rule of the author quoted seems to be sustained by the consideration that marriage is a peculiar contract, to be celebrated with prescribed ceremonies, and therefore subsequent acts, not amounting in themselves to a marriage, will not make that good which was bad in the beginning. *But we do not propose to lay down such a rule in this case*, for we are clearly of opinion that at no time since this marriage has this person been so in possession of her faculties as to be capable of judging her rights or interests, or of making or confirming a contract.” *Crump v. Morgan*, 3 Ired. Eq. (N. C.) 91, 40 Am. D. 447 (1843).

tion.<sup>1</sup> But the better doctrine is believed to be that one who marries while insane may, when restored to reason, affirm the marriage by giving consent to what has been done, or by acquiescence or long cohabitation, and that such marriage, when thus affirmed, does not require a new celebration.<sup>2</sup> This doctrine is in conformity with the law of ratification by subsequent consent where the party was at the time of marriage incapable of giving a valid consent on account of want of age, fraud, error or duress.<sup>3</sup> For when the fraud or mistake is discovered, the duress escaped, or the age of consent is attained, the party may treat the marriage ceremony as valid, and thus ratify what has been done. The consent and the marriage ceremony need not be simultaneous. To hold the marriage of the insane to be void although there has been an affirmation would open the way for fraud, and cause marriages to be contested where there was some doubt of the sanity of the party. After a long cohabitation, when children are born, titles conveyed, property acquired and credit obtained, every consideration of public policy demands that a marriage so long affirmed should not be annulled, children declared illegitimate, titles disturbed, and securities declared void, because the ceremony of marriage and the consent to it were not simultaneous.

**§ 671. How marriage disaffirmed.**—The marriage of an insane person is a mere nullity unless affirmed after reason is restored. If the insane person dies before reason is re-

<sup>1</sup> *Portsmouth v. Portsmouth*, 1 Hagg. Ec. 355; *Browning v. Reane*, 2 Phillim. 69; *Rawdon v. Rawdon*, 28 Ala. 565; *Powell v. Powell*, 18 Kan. 371; *Jenkins v. Jenkins*, 2 Dana, 102; *Fornshill v. Murray*, 1 Bland, 479; *Middleborough v. Rochester*, 12 Mass. 363; *Ward v. Du-laney*, 23 Miss. 410; *Smith v. Smith*, 47 Miss. 211; *True v. Ranney*, 21 N. H. 52; *Keys v. Keys*, 22 N. H. 553; *Christy v. Clarke*, 45 Barb. 529; *Foster v. Means*, 1 Speer Eq.

<sup>2</sup> *Cole v. Cole*, 5 Sneed (Tenn.), 57 (1857), citing *Bishop, M. & Div.*, sec. 189; *Allis v. Billings*, 47 Mass. 415; *Wightman v. Wightman*, 4 Johns. Ch. 343. See, also, *Brown v. West-brook*, 27 Ga. 102; *Stickney v. Mather*, 24 Hun, 461; *Sabalot v. Populus*, 31 La. An. 854; *Secor v. Secor*, 1 MacAr. 630.

<sup>3</sup> *Schouler, Husb. & Wife*, § 21.

stored, or refuses to affirm the marriage after being restored to reason, such marriage is an absolute nullity not changing their *status*. It is a mere idle ceremony. The invalidity of such marriage may be established in any court and in any proceeding where the question may arise,<sup>1</sup> between any parties, and whether in the life-time or after the death of the supposed husband and wife.<sup>2</sup> It is a grievous wrong to all concerned that the validity of a marriage should be open to attack at any time and in any proceeding. But such issues may be avoided, and it is believed that the only just method of preventing investigations after the death of both parties and after property rights are questioned is to obtain a decree of nullity within a reasonable time after the invalid marriage was entered into. It is unwise to prohibit such investigations by an absolute statute, for we have seen that the parties may die before the decree could be obtained, and such statute would be the instrument by which greater wrongs could be inflicted. The true method of avoiding all questions of the validity of the marriage is to determine its validity before a court of competent jurisdiction, before the parties are dead, and while witnesses of the ceremony are living and their testimony can be obtained, while associates and physicians of the alleged insane person can recall to memory the con-

<sup>1</sup> In Massachusetts the statute prohibits such collateral attack by declaring that "the validity of a marriage shall not be questioned in the trial of a collateral issue on account of the sanity or idiocy of either party, but only in a process duly instituted in the life-time of both parties for determining such validity." See *Goshen v. Williams*, 4 Allen, 458; *Stukey v. Mathes*, 24 Hun, 461; *Wiser v. Lockwood*, 42 Vt. 720; *Brown v. Westbrook*, 27 Ga. 102. Williams, 5 Ired. Law, 487, 44 Am. Dec. 49. See note, page 54; *Unity v. Belgrade*, 76 Me. 419; *Bell v. Bennett*, 73 Ga. 784; *Middleborough v. Rochester*, 12 Mass. 363; *Jenkins v. Jenkins*, 2 Dana, 102; *Jaques v. Public Adm.*, 1 Brad. 499; *Waymire v. Jetmire*, 22 O. St. 271; *Atkinson v. Medford*, 46 Me. 510; *Clement v. Mattison*, 3 Rich. 93; *Johnson v. Kincade*, 2 Ired. Eq. 470; *Ex parte Turing*, 1 Ves. & B. 140; *Foster v. Means*, 1 Speer's Eq. 569, 42 Am. Dec. 332; *Powell v. Powell*, 18 Kan. 371.

<sup>2</sup> *Shelf. Mar. & Div.* 479; *Schouler, Husb. & Wife*, § 21; *Gathing v.*

duct of such person, tending to prove his capacity to understand the nature of the marriage contract. Unless such decree is obtained, the question must be determined after the death of the parties, in actions for dower or courtesy,<sup>1</sup> or to fix the legitimacy of children, or to determine the title to property, and numerous other property rights affecting the heirs and the general public.<sup>2</sup>

**§ 672. Statutes declaring marriage void or voidable.**—The question whether the marriage of an insane party is void or voidable, and whether such marriage can be affirmed, is determined in many states by statutory provisions that such marriage shall be void: "Unless after the removal of the disability the parties freely cohabited as husband and wife;"<sup>3</sup> or, "not void in case of lunacy if the lunatic has recovered reason, and the parties thereafter have freely cohabited;"<sup>4</sup> or, "after restoration to reason the parties freely cohabited;"<sup>5</sup> or, "not voidable if after the restoration of the lunatic to sound mind the parties have freely cohabited as husband and wife."<sup>6</sup> The New York code declares the marriage of a lunatic "not voidable if the parties cohabit after the lunatic is restored to reason."<sup>7</sup> This provision is concise and accurate, and might well be enacted in every state to prevent the perplexing questions which arise where the statutes are ambiguous or silent. In some of the states the statutes declare that the marriage of an incompetent party "shall be void from the time its nullity shall be declared by a court of competent jurisdiction." In effect this declares the marriage valid until a decree of nullity has been rendered.<sup>8</sup> The result of this legislative folly is that, if a raving lunatic marries and dies before the delay of the

<sup>1</sup> Jenkins *v.* Jenkins, 2 Dana, 103; Bell *v.* Bennett, 73 Ga. 784.

<sup>6</sup> Wyoming.

<sup>2</sup> Fornshell *v.* Murray, 1 Bland's Ch. 479 (Maryland, 1828).

<sup>7</sup> Similar provisions may be found in the statutes of Nevada, Oregon and Vermont.

<sup>3</sup> California, North Dakota, South Dakota, Idaho.

<sup>8</sup> Wiser *v.* Lockwood, 42 Vt. 720; Eliot *v.* Eliot, 77 Wis. 634, 46 N. W.

<sup>4</sup> Michigan.

806; State *v.* Cone, 86 Wis. 498, 57 N. W. 50.

<sup>5</sup> Nebraska.

law will permit a decree declaring such marriage void, the woman who brought about such marriage will be entitled to the rights of a widow.<sup>1</sup> This consequence alone would justify the repeal of such provision; but other consequences equally serious might be suggested.<sup>2</sup>

<sup>1</sup> *Wiser v. Lockwood*, 42 Vt. 720.

<sup>2</sup> Mr. Bishop has very ably criticised this form of statute as "meaningless and contradictory to the context, . . . contrary to reason, to right, and to established principles of our jurisprudence," . . . permitting the man "to commit a rape on the woman, take away her property, and vests it in him, and brings matrimony into ignominy." He arrives at the conclusion that such provision "should not be treated as void for repugnance, but as a mere senseless attempt to declare an obvious truth."

1 Mar., Sep. & Div., §§ 636-38.

## IMPOTENCY.

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- 703. Order for inspection, how enforced.
- 704. Effect of decree—Whether divorce or annulment.
- 705. Impotency renders the marriage voidable.

**§ 675. In general.**—At common law impotence or physical incompetency was cause for annulment of marriage, but in most of our states it is a cause for divorce. Whatever the form of the decree the court is empowered to enter, the law and the evidence are substantially the same. The indecency of the required evidence and the invasion of the privacy of both parties has deterred many from bringing suit for this cause; but such considerations cannot obstruct the administration of the law or hinder the averment and proof of the necessary facts. The incapacity of one party is a defect rendering true marriage impossible, and defeating the purpose of the marital relation to such an extent that the law wisely relieves both parties from their obligations.

But in practice it is advisable to avoid this cause not only on account of the difficulty of proof, but because other causes for divorce will answer as well. If the cohabitation with an impotent party has proved injurious to the complainant's health, or the fraud has caused grievous mental suffering, a divorce can be obtained although some of the evidence may tend to establish incurable impotence at the time of the marriage. Or a cause for dissolution will exist if either party deserts the other for the necessary period.

Whether the marriage be annulled or dissolved the law has granted a remedy upon the broad ground that the principal ends of marriage are copula and procreation. The old writers gave as reasons the design of "having offspring" and "avoiding fornication," "to prevent licentiousness,"<sup>1</sup> and "the pleasures and enjoyments of matrimony."<sup>2</sup> So the test of impotence is not fruitfulness or sterility,<sup>3</sup> it is the ability for copula. When this is lacking, sterility generally exists, but not always.<sup>4</sup> Imperfect copula must be of such a degree as to be unnatural and disgusting to both.<sup>5</sup> The best interests of society are not advanced by "retaining within the marriage bonds parties driven to such disgusting practices. Certainly it would not tend to the prevention of adulterous intercourse, one of the greatest evils to be avoided."<sup>6</sup>

Jurisdiction to annul a marriage on the ground of impotence must be conferred by statute.<sup>7</sup> In the absence of statute a court of equity will not annul a marriage for a cause which renders it voidable and not void.<sup>8</sup> A court of equity, if without statutory jurisdiction to annul marriage

<sup>1</sup> *Deane v. Aveling*, 1 Rob. Eq. 279; <sup>5</sup> *Lewis v. Hayward*, 4 Swab. & B. v. B., 1 Spinks, 248; *Briggs v. T.* 115. <sup>6</sup> Dr. Lushington in *Deane v.*

*Morgan*, 3 Phillim. 325.

*Aveling*, 1 Rob. Eq. 279. See, also,

<sup>2</sup> *G. v. G.*, 2 P. & M. 287.

similar reasons given in *G. v. G.*, 33 Md. 401.

<sup>3</sup> *Deane v. Aveling*, 1 Rob. Eq. 279.

<sup>4</sup> *Bishop, Mar., Sep. & Div.*, §§ 774, 775. <sup>7</sup> *Anon.*, 24 N. J. Eq. 19.

<sup>8</sup> *Id.*

for this cause, will not assume jurisdiction on the ground of fraud.<sup>1</sup>

**§ 676. Impotency defined.**— Impotency, to be a cause for annulment or dissolution of the marriage, is such incurable physical incapacity of one of the parties as prevents true and natural copulation. The copulation which is referred to is *copula vera*, not partial, imperfect or unnatural.<sup>2</sup> The incapacity must exist at the time of the marriage.<sup>3</sup> If it arises subsequent to the marriage the divorce should not be granted, for then the essential element of fraud and imposition is lacking.<sup>4</sup> The term “naturally impotent” is said to mean incurably impotent, and from natural causes, and not from accident, disease or self-abuse.<sup>5</sup>

**§ 677. Physically incapacitated.**— A statute which provides that either party is entitled to a divorce “when the other party was, at the time of the marriage, physically and incurably incapacitated from entering into the marriage state,” is held to denote the same physical incapacity as impotence. The term “impotent” means powerless or wanting in physical power to consummate the marriage.<sup>6</sup>

**§ 678. Matrimonial incapacity.**— Under a statute allowing divorce for “matrimonial incapacity at the time of the marriage,” the pregnancy of the wife before marriage is held a “matrimonial incapacity,” where the husband was not aware of her condition and had no criminal connection with her.<sup>7</sup> This is a most liberal interpretation of the term “matrimonial.” Matrimonial incapacity would doubtless include all physical incapacities to enter into the marriage relation.

**§ 679. Physically incapable.**— The fact that the woman was pregnant at the time of her marriage is not a ground

<sup>1</sup> § 683.

<sup>5</sup> Griffith *v.* Griffith, 55 Ill. Ap.

<sup>2</sup> Payne *v.* Payne, 46 Minn. 467, 474.  
49 N. W. 230.

<sup>6</sup> Anonymous, 89 Ala. 291, 7 So.

<sup>3</sup> Powell *v.* Powell, 18 Kan. 371. 100.

<sup>4</sup> Bascomb *v.* Bascomb, 5 Foster, 267 (1852), reviewing authorities. <sup>7</sup> Caton *v.* Caton, 6 Mackey, 309.

for annulment of marriage under section 82 of the Civil Code of California, providing for such relief when "either party was, at the time of the marriage, physically incapable of entering into the married state, and such incapacity continues, and appears to be incurable," as this clause includes only such physical defect or incurable disease existing at the time of marriage as will prevent sexual intercourse.<sup>1</sup>

**§ 680. Must be permanent or incurable.**—Generally the courts require some proof that the impotence is permanent or incurable.<sup>2</sup> And it was once asserted that, if the defect could be removed without serious danger, it would not be a ground of nullity, though the party refuses to submit to a surgical operation.<sup>3</sup> The reason assigned was that, if the law were otherwise, a party might, by being impotent or incapable, as she chose, thus affirm or deny the marriage. But this objection requires the impossible of the capable party who is seeking relief, since he cannot compel the operation. Something similar occurs in a case of desertion, as the deserter may return or not, as he chooses; thus, at his own election, rendering the dissolution of the marriage possible or impossible. It is clear from the authorities that relief was not denied the capable party because the impotent would not submit to treatment. Thus, where the marriage had not been consummated after two years and ten months' cohabitation, a decree was granted, although the husband might have overcome the hysteria had the wife taken the prescribed remedies.<sup>4</sup> Where the operation might have been successful had the woman submitted to it, the court granted

<sup>1</sup> *Franke v. Franke* (Cal.), 31 P. 571, distinguishing *Baker v. Baker*, 13 Cal. 87.

<sup>2</sup> *Payne v. Payne*, 46 Minn., 467, 49 N. W. 230; *D. v. A.*, 1 Rob. Ec. 279; *Ferris v. Ferris*, 8 Conn. 166; *Bascomb v. Bascomb*, 5 Foster (N. H.), 267; *G. v. G.*, 33 Md. 401; *Norton v. Norton*, 2 Aikens, 188; *Anonymous*, 89 Ala. 291; Anony-

mous, 10 W. N. C. 569; *Anonymous*, 11 W. N. C. 479; *Roe v. Roe*, 29 Pitts. Leg. J. 319; *Anonymous*, 35 Ala. 226.

<sup>3</sup> *Devanbaugh v. Devanbaugh*, 6 Paige, 175.

<sup>4</sup> *G. v. G.*, 2 P. & M. 287. See, also, *P. v. L.*, 3 P. D. 78; *W. v. H.*, 2 Swab. & T. 240.

the husband a decree, saying that "the court cannot compel her to submit, and the man can only be expected to take all reasonable means to persuade her. This he has done, and she has distinctly refused."<sup>1</sup> The wife may obtain a decree of nullity on account of the husband's impotence, because such impotence proceeds from self-abuse and is curable by the exercise of self-restraint. His failure to exercise such restraint will not affect her right to a decree.<sup>2</sup>

**§ 681. Forms of impotence.**—No particular form of impotence is necessary. It may be any form which prevents natural copulation and is incurable. Deformities are an uncommon form of impotence, and but a few instances are to be found among the reported cases.<sup>3</sup> Sometimes the form is that of arrested development of the wife's organs, which is generally incurable.<sup>4</sup> The most common form is that of frigidity or latent incapacity of the husband.<sup>5</sup> The extreme physical sensibility and hysteria of the wife may be so incurable as to prevent intercourse, and is then a form of physical incapacity.<sup>6</sup> A long period of cohabitation is required to prove that such condition is incurable; but it seems that in one case a triennial cohabitation was not required, two years and ten months being held sufficient.

<sup>1</sup> *L. v. L.*, 7 P. D. 16.

<sup>5</sup> *G. v. M.*, 10 Ap. Cas. 171; *F. v.*

<sup>2</sup> *F. v. D.*, 4 Swab. & T. 86; *S. v. D.*, 4 Swab. & T. 86; *Lorenz v. Lorenz*, 93 Ill. 376; *A. v. A.*, 19 L. E., 3 Swab. & T. 240.

<sup>6</sup> *G. v. M.*, 10 Ap. Cas. 171; *F. v.*

<sup>3</sup> In *Briggs v. Morgan*, 3 *Phillim.* 325; *B. v. B.*, 1 *Spinks*, 248; *W. v. R.*, 1 P. D. 405, the wife's malformation was alleged. In *Peipho v. Peipho*, 88 Ill. 438, the husband alleged that his wife was a hermaphrodite, and incapable of intercourse when sexually excited. In one case the husband alleged that the wife's vagina was closed. *Kempf v. Kempf*, 34 Mo. 211.

<sup>5</sup> *G. v. M.*, 10 Ap. Cas. 171; *F. v.* *D.*, 4 Swab. & T. 86; *Lorenz v. Lorenz*, 93 Ill. 376; *A. v. A.*, 19 L. R. (Ireland), 403. This form may arise from self-abuse. See *S. v. E.*, 3 *Swab. & T.* 240; *F. v. D.*, 4 *Swab. & T.* 86; *Griffith v. Griffith*, 55 Ill. Ap. 474. In *Anon.*, 89 Ala. 291, 7 So. 100, the wife complained of the abnormal proportions of the husband's organs.

<sup>4</sup> *G. v. G.*, 33 Md. 401; *S. v. A.*, 3 P. D. 72. And see *P. v. L.*, in note, 3 P. D. 73.

<sup>6</sup> *H. v. P.*, 3 P. & M. 126; *G. v. G.*, 2 P. & M. 287; *S. v. A.*, 3 P. D. 72; *Merrill v. Merrill*, 126 Mass. 228; *L. v. L.*, 7 P. D. 16.

Since this is a nervous and not a structural defect, it should be established by clear and satisfactory evidence that the disease will not yield to skilful treatment, and that the difficulty is not a mere wilful refusal of intercourse.

**§ 682. Refusing intercourse.**—The fact that the wife refuses all attempts to have sexual intercourse, assigning no reason for such refusal, and admits her incapacity, but refuses to submit to the examination of physicians, is not sufficient evidence to justify a finding that she is impotent.<sup>1</sup> But if the husband has attempted intercourse, and found it impossible, and the wife becomes hysterical and resists all further attempts, a decree will be granted although she denies the incapacity.<sup>2</sup> If the intercourse has taken place at one time, her subsequent refusal is not to be considered as evidence of impotence.<sup>3</sup>

**§ 683. Impotence as a fraud.**—Unless the impotence is unknown to the incompetent party, he or she commits a fraud upon the competent party by entering into a relation the duties of which cannot be fulfilled. Sometimes the transaction is viewed in this light.<sup>4</sup> But it is not a fraud in the ordinary sense giving the right of rescission or action for damages.<sup>5</sup> And if the parties continue cohabitation, this will not, as in a case of fraud, be considered a bar, but is additional proof that a consummation has been attempted. Even cohabitation during suit is not a bar to this proceeding.<sup>6</sup> Although courts of equity may have jurisdiction to annul marriages for fraud and other causes rendering the marriage absolutely void, it is held that impotence is not such a fraud, and that no relief can be granted for such cause unless authorized by statute.<sup>7</sup>

<sup>1</sup> *Merrill v. Merrill*, 126 Mass. 228. tract." *Benton v. Benton*, 1 Day,

<sup>2</sup> *P. v. L.*, note in *S. v. A.*, 3 P. D. 111. But see *Guilford v. Oxford*, 9 Conn. 321. See, also, disease as a

<sup>3</sup> *S. v. A.*, 3 P. D. 72.

<sup>4</sup> *Bascomb v. Bascomb*, 5 Foster

<sup>5</sup> See *Burtis v. Burtis*, 1 Hopkins,

(N. H.), 267. In Connecticut the marriage of an impotent person is considered as a "fraudulent con-

<sup>6</sup> 557; *Perry v. Perry*, 2 Paige, 501.

<sup>7</sup> *M. v. H.*, 3 Swab. & T. 592.

<sup>7</sup> *Burtis v. Burtis*, 1 Hopkins Ch.

**§ 684. What will bar the action — Adultery not a bar.** In a nullity suit adultery or other recrimination is not a bar, since, the marriage being null, the cause for divorce cannot be considered, as no marriage obligations were violated.<sup>1</sup>

**§ 685. Age of parties.**—The inspection of the person is deemed more odious as the party increases in years; and as the suit is supposed to be based upon injuries arising from the inability to copulate, the age of the parties sometimes bars the suit.<sup>2</sup> There is, however, no particular age which will bar the suit.<sup>3</sup> Where the wife waited twenty-seven years after the marriage before bringing suit to annul the marriage, this delay and her own age were sufficient to prevent a decree. She was in her forty-eighth year, "an age when neither the procreation of children nor the gratification of the passions," the usual motives which lead to the institution of such suits, were present.<sup>4</sup>

**§ 686. Deed of separation not a bar.**—Although a deed of separation is entered into deliberately and with full knowledge of all the facts with the express purpose of preventing a scandalous litigation and needless exposure, such agreement will not bar a divorce for impotence. To hold such agreement binding would be "alike unjust and against reason and public policy."<sup>5</sup> But where the manifest purpose of such suit was to escape liability under the agreement and there had been a delay of eight years, a suit was dismissed for insincerity.<sup>6</sup>

**§ 687. Recrimination not a bar.**—If the marriage cannot be consummated on account of the impotence of one of

(N. Y.) 557. See, also, *Perry v. Perry*, 2 Paige, 501. for divorce on account of the wife's adultery.

<sup>1</sup> *McCarthy v. De Caix*, 2 Cl. & F. 568; *M. v. D.*, 10 P. D. 75, 175; *G. v. M.* 10 Ap. Cas. 171; *A. B. v. C. B.*, 11 Scotch Sess. Cas. (4th Ser.) 1060;

*s. c.*, *C. B. v. A. B.*, 12 id. (H. L.) 36. <sup>2</sup> *Shafto v. Shafto*, 28 N. J. Eq. 34; *Fulmer v. Fulmer*, 36 Leg. Int. (Pa.) 93.

<sup>3</sup> *W. v. H.*, 2 Swab. & T. 240.

<sup>4</sup> *W. v. R.*, 1 P. D. 405.

<sup>5</sup> *G. v. G.*, 33 Md. 401 (1870).

<sup>6</sup> *M. v. C.*, 2 P. & M. 414.

*In Griffin v. Griffin*, 23 How. Pr. 189, it was held that the husband's impotency was no bar to his suit

the parties, the law does not refuse a divorce on the ground that the competent party is guilty of some misconduct which entitles the other to a divorce.<sup>1</sup> This form of suit proceeds upon the theory that the marriage is voidable on account of physical defects, and not upon the theory that a marital wrong has been committed.

**§ 688. Delay.**—We have considered the effect of delay in reference to actions for divorce, and some differences will be noticed here, as they apply to the suit for nullity on account of impotence. No particular period of time is held to be an unreasonable delay, but each case depends upon its own merits.<sup>2</sup> Where a wife brought suit twenty-one years after separating from her husband and twenty-five years after marriage, it was a disputed question whether such delay would bar the suit. A majority of the court held that a decree should be refused.<sup>3</sup> The wife is not required to be as prompt in bringing suit as her husband, yet a delay of ten years is too great.<sup>4</sup> No objection in one case was made to her delay of twelve years.<sup>5</sup> A husband's delay of seven years was not a bar.<sup>6</sup> And in one case a delay of seventeen years was permitted.<sup>7</sup> The period within which suit for this cause can be brought is fixed by statute in some of the states.<sup>8</sup> Where all attempts at consummation are repulsed by the wife for a period of five years, when her incapacity

<sup>1</sup> *McCarthy v. De Caix*, 2 Cl. & F. 568; *Miles v. Chilton*, 1 Rob. Ec. 684.

<sup>2</sup> *Harris v. Ball*, cited in *Norton v. Seaton*, 3 Phillim. 147; *Cuno v. Cuno*, 2 H. L. Sc. 300; *S. v. A.*, 3 P. D. 72; *Anonymous*, *Deane & S.* 295; *B. N. v. B. N.*, 1 Spinks, 248; *B. v. M.*, 2 Rob. Ec. 580; *M. v. B.*, 3 Swab. & T. 550; *T. v. D.*, 1 P. & M. 127; *W. v. R.*, 1 P. D. 405; *Harrison v. Harrison*, 3 Swab. & T. 362; *M. v. D.*, 10 P. D. 75; *G. v. M.*, 10 Ap. Cas. 171.

<sup>3</sup> *H. v. C.*, 1 Swab. & T. 605; af-

firmed on appeal, *Castleden v. Castleden*, 9 H. L. Cas. 186.

<sup>4</sup> *Lorenz v. Lorenz*, 93 Ill. 376.

<sup>5</sup> *Pollard v. Wybourn*, 1 Hag. Ec. 725.

<sup>6</sup> *Guest v. Shipley*, 2 Hag. Con. 321.

<sup>7</sup> *Langevin v. Barette*, 4 Rev. Leg. (Quebec), 160.

<sup>8</sup> Generally the period is two years after the marriage. Arizona, Michigan, New York, Nebraska, Vermont, Wyoming. In California, North and South Dakota and Idaho the action must be within four years.

was discovered, and twelve years after the marriage she submitted to an unsuccessful operation, a delay of two years after the operation did not bar the husband's suit.<sup>1</sup> Where the husband's application was not made until thirteen years after the marriage and several years after the wife had become insane, and while she was in an insane asylum, the court held the delay too great. "For nearly eight years the complainant cohabited with appellee, with full knowledge and without complaint of this cause. In the absence of strong rebutting facts, he must be taken to have accepted the situation, and cannot now be heard to complain. Mere motives of delicacy are not a sufficient explanation of such long-continued acquiescence."<sup>2</sup> A delay of five years was explained by the fact that complainant was restrained by conscientious scruples from seeking a divorce and supposed it to be inconsistent with his religious duty; and a divorce *a vinculo* was granted although the parties had entered into a deed of separation.<sup>3</sup>

**§ 689. Insincerity.**—It was a rule of the ecclesiastical courts to refuse to annul a marriage where it appeared that the plaintiff prosecuted the suit for some collateral motive other than the real cause of complaint. Thus, where a party, after some delay, brings the suit because the husband has ceased to support her;<sup>4</sup> or because the annulment will relieve from the liability of further support;<sup>5</sup> or to silence reports that complainant is insane;<sup>6</sup> the court will not grant a decree because the real grievance is not a failure to have sexual intercourse.<sup>7</sup> This doctrine of "insincerity" was applied with such strictness as to be productive of much injustice, and has been criticised as severe and a fruitless attempt to discern all the motives of the plaintiff.<sup>8</sup> The presence of collateral motives should not bar the remedy where there is

<sup>1</sup> *A. B. v. C. B.*, 34 N. J. Eq. 43.

<sup>5</sup> *M. v. C.*, 2 P. & M. 414.

<sup>2</sup> *Peipho v. Peipho*, 88 Ill. 438.

<sup>6</sup> *M. v. B.*, 3 Swab. & T. 550.

<sup>3</sup> *G. v. G.*, 33 Md. 401.

<sup>7</sup> *W. v. R.*, 1 P. D. 405.

<sup>4</sup> *Castleden v. Castleden*, 9 H. L. Cas. 186.

<sup>8</sup> *G. v. M.*, 10 Ap. Cas. 171.

a cause of action established by satisfactory evidence. The doctrine has not been affirmed in any American cases, and it is safe to say that a suit to annul a marriage will not be dismissed because the unfortunate party desires to recover all her separate property, to vindicate her reputation, to avoid a cohabitation which threatens to injure her health, or to marry another, or in fact for any other collateral purpose which is recognized by the law and for which a remedy has been provided in other cases. But where there has been delay, and this combined with collateral purpose, the case is then governed by different considerations.

**§ 690. Estoppel — Impotent party as plaintiff.**— It is a principle of justice and reason that no man can take advantage of his own wrong, and a party who is conscious that he has some incurable defect cannot enter into the marriage relation and afterwards have the marriage declared null.<sup>1</sup> If the marriage with an impotent party was void instead of voidable, other reasons would apply; as where the courts relieve the parties from a bigamous marriage.<sup>2</sup> But the wife may choose to live with the impotent husband, and then he cannot avoid the duties of the marriage, such as support and cohabitation, by having the marriage annulled. If, after unsuccessful attempts to consummate the marriage, the wife deserts, the husband should not be precluded from obtaining a decree annulling the marriage, where he was at the time of the marriage unconscious of his frigidity and consequent impotence.<sup>3</sup>

**§ 691. Pleading — In general.**— The complaint must allege the marriage; the peculiar form of the physical incapacity in such specific language as to show that natural copulation is impossible; that the defect existed at the time

<sup>1</sup> *Norton v. Seaton*, 3 Phillim. 147 (1820). In *H. v. B.*, 6 P. D. 13, a decree of nullity had been entered on account of the cruelty and impotence of the co-respondent. The petitioner refused to have this de-

cree made absolute, and the application of co-respondent for that purpose was denied.

<sup>2</sup> *Miles v. Chilton*, 1 Rob. Ec. 684.

<sup>3</sup> *A. v. A.*, 19 L. R. (Ireland), 403.

of the marriage; and is incurable.<sup>1</sup> Fraud, not being an essential element in this cause of action, need not be alleged. Nor is it necessary in all cases that the woman allege that she is a virgin and capable. Her capacity is presumed and is therefore not a necessary averment. Her virginity is properly alleged if such is the case, but relief will not be denied should the evidence show that she has had children by a former marriage, or where she has committed adultery. The age of the parties is usually alleged, but the omission of this fact would not render the pleading demurrable.

**§ 692. How impotency alleged.**—The following form contains all the necessary averments, and is probably sufficient under the rules of code pleading.<sup>2</sup> To this form an allegation may be added “that plaintiff is a virgin and unknown of man” if such is the fact. But such allegation is not a necessary one, and is perhaps objectionable as alleging evidence of the husband’s impotence, a fact already stated in this pleading.<sup>3</sup>

<sup>1</sup> Under a statute permitting a sentence of nullity “when either party at the time of the marriage was, and still is, impotent,” an allegation that “the defendant was, and still is, impotent, in that the mouth of the vagina of the said Margaret was and still is closed, so as to prevent copulation,” was held sufficient, as the term “impotent” implies “incurability.” *Kempf v. Kempf*, 34 Mo. 211. The term “corporal imbecility” is not a sufficient term to denote an incurable physical incapacity to consummate the marriage. *Ferris v. Ferris*, 8 Conn. 166.

<sup>2</sup> That on the — day of —, —, the plaintiff, whose maiden name was A., married the defendant B., and cohabited with him from said date until the day of —, —.

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That at the time of said marriage the defendant was, and has ever since continued to be, impotent, by reason of (here state the nature of physical incapacity), and that said incapacity is incurable.

That, on account of said physical incapacity, the defendant has been, and is now, unable to consummate said marriage, although the plaintiff is apt and willing to do so.

<sup>3</sup> In *Serrell v. Serrell*, 2 Swab. & T. 422, the husband asked for a dissolution of the marriage on account of the wife’s adultery. The wife, in her answer, denied that she was lawfully married to plaintiff, and pleaded his impotence in the following language: “That at the time of the celebration of the said pretended marriage on the 5th of November, 1844, the said

**§ 693. Different forms of impotence may be joined.—** Different forms of incapacity may be joined so long as they are not in their nature inconsistent. Thus, malformation may be alleged with frigidity resulting from or existing with it.<sup>1</sup> The following petition is an illustration of the method of alleging the incapacity, first, as a malformation, and second, as a weakness or frigidity of the parts of generation.<sup>2</sup>

**§ 694. Evidence — In general.—** The proof must be satisfactory and as direct as is possible under the circumstances of the case. The impotence of the husband may be shown by proving cohabitation and that the wife remains a virgin.<sup>3</sup> But the signs of virginity are uncertain,<sup>4</sup> and there are many

S— was impotent, and unable to consummate their said marriage; that such impotency was then, and now is, incurable; that notwithstanding the said S— consulted divers medical men, and adopted divers remedies, he continued impotent, unable to consummate the said marriage; and that, although the respondent was apt and willing to receive the conjugal embraces of the said S—, he never did consummate the said marriage; but that, down to the 8th of January, 1861, when the respondent ceased to reside with the said S—, she was and continued to be a virgin intact." The prayer of the answer was for annulment of marriage. The above pleading would, under the rules of code pleading, be open to the objection that the nature of the incapacity is not stated, and it is indefinite in that respect. See above form.

<sup>1</sup> *Welde v. Welde*, 2 Lee, 578.

<sup>2</sup> "First, that on, etc., the petitioner being about twenty-four years of age and the respondent

twenty-six (proceeding to allege the marriage and cohabitation).

"Second, that from the said date the petitioner lived with the said respondent at, etc., but that the said respondent was at said date, and has ever since continued to be, wholly unable to consummate his said marriage by reason of the malformation of his parts of generation, and that such malformation is incurable by art or skill.

"Third, that the said respondent was, at the time of the said marriage, and has ever since continued to be, wholly unable to consummate the said marriage by reason of the frigidity and impotence of his parts of generation, and that such frigidity and impotence of his parts of generation are wholly incurable by art or skill." *M. v. H.*, 3 Swab. & T. 517; *s. c.* *Marshall v. Hamilton*, 10 Jur. (N. S.) 853.

<sup>3</sup> *M. v. H.*, 3 Swab. & T. 517; *M. v. B.*, 3 Swab. & T. 550; *Pollard v. Wyborn*, 1 Hagg. Ec. 725; *Anon.*, 11 W. N. Cas. 479; *Grimbaldeston v. Anderson*, cited in 3 *Phillim.* 155.

<sup>4</sup> *S. v. E.*, 3 Swab. & T. 240.

cases where the husband was shown to be impotent and the marriage annulled, although the signs of virginity were doubtful.<sup>1</sup> And in one case it was established by medical testimony that the hymen may remain, although the marriage is consummated.<sup>2</sup> In another a decree was granted the wife where there was a triennial cohabitation, and proof that the husband had admitted his impotency, although there was no proof of virginity, and the husband denied his incapacity in the answer.<sup>3</sup> The admission of the defendant and the testimony of the plaintiff has been held insufficient where the physician's testimony is equivocal and the incapacity, if it existed, was latent.<sup>4</sup> Where the testimony of the parties is contradictory and the testimony of the physicians leaves the question of her virginity in doubt, the suit should be dismissed for lack of evidence.<sup>5</sup> If the evidence is not clear the courts inquire into the motives of the parties, the date when complaint of the impotence was first made to others, and any conduct of the parties which may account for the suit being brought on account of collateral motives. In such cases the court looks at all the circumstances and the conduct of the parties for corroboration. In one case the inquiry was, when did the petitioner first become aware of the alleged deficiencies of her husband and how did she conduct herself upon that discovery?<sup>6</sup> The fact that the wife lives with her husband for ten years without complaint is considered a suspicious circumstance tending to show that her testimony is a fabrication.<sup>7</sup> The birth of a child is sufficient evidence to disprove her physical incapacity.<sup>8</sup>

<sup>1</sup> *T. v. D.*, 1 P. & M. 127; *L. v. H.*, 4 Swab. & T. 115; *F. v. D.*, 4 Swab. & T. 86.

<sup>2</sup> *L. v. H.*, 4 Swab. & T. 115.

<sup>3</sup> *Sparrow v. Harrison*, 3 Curt. Ec.

<sup>16</sup>. The report of the physicians was as follows: "The signs of virginity are in many instances inconclusive. In the present case there are no positive proofs of connection having ever taken place,

or the contrary; but there are decidedly no physical impediments to sexual intercourse." See this case affirmed, *Harrison v. Harrison*, 4 Moore, P. C. 96.

<sup>4</sup> *Lorenz v. Lorenz*, 93 Ill. 376.

<sup>5</sup> *U. v. J.*, 1 P. & M. 460.

<sup>6</sup> *Cuno v. Cuno*, 2 P. & M. 414.

<sup>7</sup> *Lorenz v. Lorenz*, 93 Ill. 376.

<sup>8</sup> *Riley v. Riley*, 26 N. Y. Supp. 164, 73 Hun, 694.

**§ 695. Burden of proof.**—The burden of proof is, of course, with the party alleging the impotence, and the evidence must establish its existence at the time of the marriage, and that it is of an incurable nature.<sup>1</sup> The evidence must be clear and satisfactory, and sufficient to convince the court that the incapacity exists. In one case the court granted a decree upon the uncorroborated testimony of the wife.<sup>2</sup> Ordinarily more proof will be required.

**§ 696. Triennial cohabitation.**—It was a rule of the canon law, recognized by the ecclesiastical courts, that where the parties after marriage have lived together for a period of *three years*, and the woman can show that she is *virgo intacta*, the impotency of one of the parties will be presumed in the absence of rebutting proof.<sup>3</sup> It is not a rule of law requiring such cohabitation in doubtful cases, but is a mere rule of presumption where direct evidence is not before the court. If the parties have lived together in the same house for three years, under ordinary opportunities for intercourse, and there has been no consummation, the impotency of one of the parties is presumed. But this presumption may be rebutted.<sup>4</sup> Where the defect is obvious, or can be proved by competent testimony, no particular period of cohabitation is required or is necessary.<sup>5</sup> The presumption

<sup>1</sup> *Brown v. Brown*, 1 Hag. Ec. 523; *Welde v. Welde*, 2 Lee, 578. *Welde v. Welde*, 2 Lee, 578; *Devanbaugh v. Devanbaugh*, 5 Paige, 554; *M. v. C.*, 2 P. & M. 414. See same case affirmed, *Cuno v. Cuno*, 2 Scotch Ap. (H. L.) 300; *Newell v. Newell*, 9 Paige, 25.

<sup>2</sup> *Christman v. Christman*, 7 Pa. Co. Ct. Rep. 595.

<sup>3</sup> *G. v. M.*, 10 Appeal Cases, 171 (1885); *Pollard v. Wybourn*, 1 Hag. Ec. 725.

<sup>4</sup> *C. B. v. A. B.*, 12 Scotch Sess. Cas. (4th Ser.) H. L. 36.

<sup>5</sup> *Deane v. Aveling*, 1 Rob. Ec. 279; *Briggs v. Morgan*, 3 Phillim.

This requirement seems to have been absolute in some cases. *Aleson v. Aleson*, 2 Lee, 576; *Lewis v. Lewis*, cited *Welde v. Welde*, 2 Lee, 579; *Gimbalderson v. Anderson*, cited in *Norton v. Seaton*, 3 Phillim. 147. In *Greenstreet v. Cumyns*, 2 Phillim. 10, it is considered "a well known and valuable rule, adopted of old time for the guidance of the court, that impotence shall be presumed after three years of ineffectual cohabitation, and shall not be presumed before." See, also, *U. v. F.*, 2 Rob.

from triennial cohabitation may be applied by our courts, but ordinarily the evidence will be sufficient without it.<sup>1</sup>

Where the impotence complained of is the result of self-abuse, which may be cured by self-restraint and proper treatment, the period of cohabitation must be for such a length of time as to show that the weakness is incurable, because the defendant will not submit to treatment or abandon the habit. A cohabitation of only two months is held to be insufficient in such cases.<sup>2</sup>

**§ 697. Inspection of the person.**—When the proofs are doubtful, the court may order an inspection of the person by medical experts, who examine the sexual organs of the parties and report whether or not they are capable of marriage consummation. The ecclesiastical courts appointed three persons — two physicians and a surgeon, or two surgeons and a physician. These were nominated by the plaintiff or promoter, but the adverse party had the privilege of choosing one of them.<sup>3</sup> It seems that at one time the woman was examined by matrons and midwives.<sup>4</sup>

Ec. 614; *S. v. E.*, 3 Swab. & T. 240; *M. v. H.*, 3 Swab. & T. 517; *F. v. D.*, 4 Swab. & T. 86; *G. v. G.*, 2 P. & M. 287; *A. v. B.*, 1 P. & M. 559; *N—r v. M—e*, 2 Rob. Ec. 625; *S. c. Anon.*, 22 Eng. Law & Eq. 637; *A. v. B.*, 1 Spinks, 12.

<sup>1</sup> In *Anonymous*, 89 Ala. 291, 7 So. 100, the rule was not applied owing to the form of the statute.

<sup>2</sup> *Griffith v. Griffith*, 55 Ill. Ap. 474; *S. v. E.*, 3 Swab. & T. 240.

<sup>3</sup> See proceedings in full, *Deane v. Aveling*, 1 Rob. Ec. 279.

<sup>4</sup> *Essex v. Essex*, 2 How. St. Tr. 786; *Welde v. Welde*, 2 Lee, 580. This proceeding is analogous to that pursued in the common-law courts where the execution of a death sentence was suspended if the woman was found to be with

child. A jury of matrons were sworn to inspect her person and report the result to the court. See procedure described at length in *Reg. v. Wycherley*, 8 Carr. & P. 262 (1838); *Reg. v. Baynton*, 17 How. St. Tr. 598; *State v. Arden*, 1 Bay (S. C.), 487; *Thompson on Trials*, § 852. This method of inspection has been condemned by such modern medical authority as Beck (see *Med. Jur.* 203) and Taylor (*Med. Jur.* 154), and their position is amply sustained by the history of such cases.

In some states the jury is required to be in whole or in part of medical men. To the objection that such examinations were offensive and obscene, Lord Stowell answered that "It has been said that the means resorted to

§ 698. **The power of our courts to compel inspection.**—The objection has been raised that our courts have no power to compel an inspection, since both the jurisdiction and incidental powers are conferred by statute, and no other or further power exists unless so conferred. The answer from the court to this objection is that when the legislature conferred upon a court the jurisdiction to annul a marriage for impotency, it conferred also the incidental powers necessary to make its exercise effectual. If the court has no power to compel the inspection, this would result in most cases to an absolute denial of justice, for in the very nature of the case no other evidence can be obtained. Therefore the courts may exercise the incidental powers of the English courts so far as the principles and practice of those courts are applicable to the conditions and circumstances of our people.<sup>1</sup> This doctrine is sound, and, unless the common law on this point is declared inapplicable to the conditions and wants of the people, the courts having jurisdiction to annul a marriage for this cause have also the power to compel either or both parties to submit themselves to an examination by persons appointed for that purpose.<sup>2</sup>

for proof on these occasions are offensive to natural modesty; but nature has provided no other means, and we must be under the necessity of saying that all relief shall be denied, or of applying the means within our power. The court must not sacrifice justice to notions of delicacy of its own." *Briggs v. Morgan*, 3 *Phillim.* 325.

<sup>1</sup> See *Le Barron v. Le Barron*, 35 *Vt.* 365 (1862), a leading case, citing *Devanbaugh v. Devanbaugh*, 5 *Paige*, 554, in which the following language of Chancellor Walworth is found: "When the legislature conferred this branch of its jurisdiction upon the court of chancery, it was not intended to adopt a

different principle from that which had theretofore existed in England, and indeed, in all Christian countries, as to the nature and extent of the physical incapacity which would deprive one of the parties of the power to contract matrimony. And the court is, by necessary implication, armed with all the usual powers which in that country, from which our laws are principally derived, are deemed requisite to ascertain the fact of incapacity, and without which it would be impossible to exercise such jurisdiction."

<sup>2</sup> This power was not questioned in the following cases: *Anonymous*, 35 *Ala.* 226; *Anonymous*, 89

**§ 699. Power denied.**— While it is clear that the common-law courts could compel either or both parties to submit themselves to an examination by experts appointed by the courts for that purpose, yet our courts may decline to exercise such power, because such an extraordinary remedy is not suited to the condition or to the manners of the people, and not consistent with modern legislation and the right of personal immunity. The right to exercise this power was emphatically denied by Cooley, J. “It should be understood,” said he, “that there are some rights which belong to men as men and to women as women, which in civilized communities they can never forfeit by becoming parties to divorce or any other suit, and there are limits to the indignities to which parties to legal proceedings may be lawfully subjected.”<sup>1</sup>

The power of a court to grant an order compelling a physical examination in personal injury cases has been often questioned in recent decisions, and the tendency is to deny that such power exists. The supreme court of the United States, in a recent opinion exhausting the subject, has denied the power of the court to issue and enforce an order to a party in a suit, compelling him to submit his person to an examination of surgeons without consent and in advance of the trial. The court held such extraordinary proceedings to be without authority of the common law or of the statutes of the United States and without precedent in common usage. Justice Gray, speaking for the court, quoted Judge Cooley’s remark that “the right to one’s person may be said to be a right of complete immunity, to be let alone,” and said that by the common law every individual had the right to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law; and he continued, “the inviolability of the person is as much invaded by compulsory

Ala. 291, 7 So. 100; *Darrow v. Lau-* *Shafto v. Shafto*, 28 N. J. Eq. 84;  
*rent*, 17 Lower Canada Jurist, 324; *Morrell v. Morrell*, 17 Hun, 324.

<sup>1</sup> *Page v. Page*, 51 Mich. 88.

stripping and exposure as by a blow. To compel any one to lay bare the body, or submit to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order of process, commanding such exposure or submission, was ever known to the common law in administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced in this country.”<sup>1</sup> And we find that this power of the court to compel a physical examination is denied in some of our states.<sup>2</sup> In the leading case upon this question,<sup>3</sup> the power to compel the examination is sustained on the ground that a party to an action has a right to demand the administration of exact justice, and for that purpose all essential evidence within the control of the court shall be produced, and that it is within the power of the court to compel the plaintiff as a witness before it to submit to an examination or treat his refusal as a contempt. The power is also admitted in a number of cases decided since the above case, some of which cite it, and others use the same or similar reasons.

**§ 700. When inspection necessary.**— Since the rule that the impotent party must be examined is based upon the necessity of such evidence, where there is other competent

<sup>1</sup> *Union Pacific Ry. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000. See, also, dissenting opinion of Brewer, J.

<sup>2</sup> *Roberts v. Ogdensburg*, etc. R. R. Co., 29 Hun, 154. This case in effect overrules *Walsh v. Sayer*, 52 How. Pr. 384, and *Shaw v. Van Rensselaer*, 60 How. Pr. 143; approved and followed in *Neuman v. Third Avenue R. R. Co.*, 18 J. & S. 412; *McSwyny v. Broadway*, etc. R. R. Co., 7 N. Y. Supp. 456; s. c., 27 St. Rep. 363, and in *Elfers v. Woolley*, 116 N. Y. 294; s. c., 26 St. Rep. 678. See dissenting opinion. *McQuigan v. Delaware*, etc. R. R. Co., 122 N. Y. 618; *Parker v. Enslow*, 102 Ill. 272; *Chicago*, etc. R. R. Co. v. *Holland*, 18 Ill. Ap. 418, 423; s. c., 122 Ill. 461. The case of *Loyd v. Hannibal*, etc. R. R. Co., 57 Mo. 509, has been overruled. *Pennsylvania R. R. Co. v. Newmeyer*, 28 N. E. 860, overruling the *dictum* in *Kern v. Bridwell*, 119 Ind. 226, 21 N. E. 664.

<sup>3</sup> *Schroeder v. Chicago*, etc. Ry. Co., 47 Ia. 375.

evidence the inspection will be refused. It is not necessary, as was once supposed, that there be physical examination in every case.<sup>1</sup> All that is required is a *prima facie* case, or such evidence as will convince the court that the incapacity exists and that there is no collusion between the parties.<sup>2</sup> An inspection is not necessary where the court finds there is such insincerity as will bar the decree.<sup>3</sup> The necessity of an examination was denied where the party was in her sixtieth year.<sup>4</sup> The necessity for the examination should appear in the trial and not upon a showing made before the hearing. Since this indelicate invasion of personal rights must be justified by the most extreme necessity arising from the conflict of evidence, or the lack of it, all preliminary questions should first be determined, such as the presence of the defect at the time of the marriage, the age of the parties, the incurable nature of the incapacity, and whether it would be such as to prevent natural copulation, and whether the action is not barred by delay or insincerity. And after hearing all the testimony, if the court is satisfied that the action must be dismissed, the court may, in its discretion, refuse to order a compulsory examination. An *ex parte* examination by the party's own physician has been held to be insufficient in a contested case,<sup>5</sup> and the defendant was required to submit to an inspection by one or more respectable physicians chosen by complainant, with the sanction of the court. For many obvious reasons the party's own physician should be permitted to be one of the inspectors or at least be present. If physicians have examined the incompetent party before the suit was brought, their testimony will be sufficient without an inspection.<sup>6</sup> Particularly is this true where the wife's surgeon testifies that

<sup>1</sup> *H. v. C.*, 1 Swab. & T. 605. But see where decree granted without inspection, *F. v. D.*, 4 Swab. & T. 86.

<sup>2</sup> *Harrison v. Harrison*, 4 Moore P. C. 96.

<sup>3</sup> *Briggs v. Morgan*, 3 Phila. 325.

<sup>4</sup> *Shafto v. Shafto*, 28 N. J. Eq. 34.

<sup>5</sup> *Newell v. Newell*, 9 Paige, 25.

<sup>6</sup> *Brown v. Brown*, 1 Hag. Ec. 523, 3 Eng. Ec. 229; *Anonymous*, 35 Ala.

226; *Devanbaugh v. Devanbaugh*, 5 Paige, 554.

the difficulty has not been cured after several operations.<sup>1</sup> Where the plaintiff introduced the testimony of two physicians who had examined the wife, and also the testimony of the family physician and his assistant, it was sufficient, and the court did not err in refusing an order for inspection, although the medical testimony was conflicting.<sup>2</sup> The testimony of the party's own physician may often be satisfactory if corroborated by other evidence, however slight, and a compulsory examination should not be ordered until after such testimony is heard and the necessity for further evidence appears. Where the impotency of the husband is alleged, no inspection is necessary as to the virginity of the woman if she has been married before, or where, from accident, disease or other causes, no evidence of virginity could be expected,<sup>3</sup> or where she denies her virginity.

**§ 701. Inspection by commission.**—No uniform practice is followed in directing an inspection. Where a commission is ordered to take the proofs, the parties are ordered to submit themselves to a personal examination by such number of physicians and surgeons, at such time and place, and under such regulations, as are prescribed by the commissioner.<sup>4</sup> This practice has been justly criticised as being too far removed from the control of the court and leading to abuse of the privilege of examination.<sup>5</sup> In a recent case the supreme court ordered the chancellor to select the physician or matrons who were to examine a woman who complained of the abnormal proportions of the husband's sexual organs. The defendant, as a condition of his defense, must also submit to an examination if he contests the complainant's rights.<sup>6</sup> The inspectors are sworn to faithfully and to the best of their skill inspect the parts and organs of generation of each of the parties and report

<sup>1</sup> Payne v. Payne, 46 Minn. 467, 49 N. W. 230.      <sup>4</sup> Le Barron v. Le Barron, 35 Vt. 365 (1862).

<sup>2</sup> G. v. G., 33 Md. 401.

<sup>5</sup> Page v. Page, 51 Mich. 88.

<sup>3</sup> Serrell v. Serrell, 2 Swab. & T. 422.

<sup>6</sup> Anonymous, 89 Ala. 291, 7 So. 100.

in writing to the court whether the man is capable of performing the act of generation, and, if incapable, whether the incapacity can be cured; also whether the woman is or is not a virgin, or has an impediment preventing the consummation of the marriage, and whether such impediment can be remedied by a surgical operation.<sup>1</sup> The inspectors after the examination file a certificate as above, and if it appears necessary may be examined as witnesses. Their certificate does not exclude their own testimony or that of other witnesses.<sup>2</sup>

**§ 702. Personal injury cases.**—Some assistance may be derived from the examination of similar proceedings in personal injury cases. It is clear that the exercise of this power by a court is discretionary and that the refusal to exercise it is not a reversible error.<sup>3</sup> Or if there is any error in refusing an application for the appointment of experts, it is cured where it is shown that all the facts are fairly and fully brought out by the testimony of competent and unbiased witnesses.<sup>4</sup> There is a presumption which always runs in favor of the trial court, that the order was refused under such circumstances that it ought not to have been granted, and he who complains of the ruling must show that the error committed was prejudicial to him.<sup>5</sup> The power of the court to appoint experts for this inspection, if exercised at all, should be to appoint one or more disinterested experts, either of its own selection or such as may be agreed upon by both parties.<sup>6</sup> Where it is sought to have an examination by experts named by the adverse party, the request

<sup>1</sup> Browne, Div. Practice (4th ed.), 622.

<sup>2</sup> For form of certificates, see W. v. H., 2 Swab. & T. 240; S. v. E., 3 Swab. & T. 240; L. v. H., 4 Swab. & T. 115. Examination of inspectors, see above cases and also M. v. B., 3 Swab. & T. 550; Deane v. Aveling, 1 Rob. Ec. 279.

<sup>3</sup> State v. Johnson, 67 N. C. 55, 2 West. Law Jour. 131.

<sup>4</sup> State v. Garrett, 71 N. C. 85, 17 Am. Rep. 1.

<sup>5</sup> Miami, etc. Co. v. Baily, 37 Ohio St. 104.

<sup>6</sup> Missouri Pacific R. R. Co. v. Johnson, 72 Tex. 95. In this case the plaintiff was willing to be ex-

should be refused,<sup>1</sup> as the application should have been that the court appoint a physician or physicians without naming any one.

It seems that the right to select the party's own physician is sometimes recognized by the courts. In one case the plaintiff, a lady of refinement, declined to submit to a compulsory examination, giving as a reason that she had been once examined by a certain skilled physician whose testimony could be obtained, and that she was also willing to submit to another examination by a resident physician, of high skill, whose testimony could also be obtained; and it was held error to deny the defendant's application, for the "plaintiff's offer was a fair one, and that asked by the defendant unreasonable."<sup>2</sup>

The court may also deny this application if it is not made in due time, or is made at such a time that it would unnecessarily prolong the trial. And if no reason is shown for the delay in making the application, it may be refused on that ground alone.<sup>3</sup> Ordinarily the request will not be granted if made during the trial, but the court may order it if the delay is explained or the necessity for such examination appears in the progress of the trial.<sup>4</sup> It will of course devolve upon the applicant to show that no examination has been made; or, if it was made, that for some reason it was insufficient and incomplete, or made by incompetent persons, or persons under the control of the opposite party. But if afterwards the applicant uses those persons who have made the examination as witnesses in the case, he will be deemed to have waived his right to a compulsory examination.<sup>5</sup>

amined by any other physician than the one selected by the defendant.

<sup>1</sup> *Sioux, etc. Ry. Co. v. Finlayson*, 16 Neb. 578.

<sup>2</sup> *Shepard v. Missouri Pacific Ry. Co.*, 85 Mo. 629.

<sup>3</sup> *Miami, etc. Co. v. Baily*, 37 Ohio St. 104.

<sup>4</sup> *Stuart v. Havens*, 17 Neb. 211. But the court may order it if it sees fit. *St. Louis Bridge Co. v. Miller* (Ill.), 28 N. E. 1091; *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156; *Railroad Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178.

<sup>5</sup> *International, etc. Ry. Co. v. Underwood*, 64 Tex. 463; *Sibley*

**§ 703. Order for inspection, how enforced.**—In case the plaintiff refuses to obey the order for inspection, the action should be dismissed.<sup>1</sup> But a more difficult question arises if the defendant refuses. It is the opinion of Mr. Bishop that an attachment for contempt will lie, but he does not refer to cases where this process was insisted upon. It has been suggested that the court can enforce this order in the same manner as it would compel a stubborn witness to testify.<sup>2</sup> But if the power to punish for contempt should fail, it is not probable that force would be resorted to in any case. The court cannot annul the marriage upon the refusal of a defendant to submit to inspection, for the parties would then be able to obtain the desired decree where the evidence might not justify any relief. In this connection it may be well to observe that a court should proceed with great caution in granting such an order, because the exercise of this power must be justified, if at all, upon the ground of necessity, and the utter absence of competent evidence should appear on the trial; and any questions relating to delay or

*v.* Smith, 46 Ark. 275; *Shaw v. Van Rensselaer*, 60 How. Pr. 143; Chicago, etc. R. R. Co. *v. Miller* (Ill.), 28 N. E. 1091; *Turnpike v. Bailey*, 37 O. St. 104; Railway Co. *v. Thul*, 29 Kan. 466; *White v. Railway Co.*, 61 Wis. 536, 21 N. W. 524; *Hatfield v. Railway Co.*, 33 Minn. 130, 22 N. W. 176; *Stewart v. Havens*, 17 Neb. 211, 22 N. W. 414; *Owens v. Railway Co.*, 95 Mo. 196, 8 S. W. 350; Railway Co. *v. Johnson*, 72 Tex. 95, 10 S. W. 325; Railway Co. *v. Childress*, 82 Ga. 719, 9 S. E. 602; Railway Co. *v. Hill*, 90 Ala. 71, 8 So. 90; *Shepard v. Mo. Pac. Ry. Co.*, 85 Mo. 629; *Kinney v. Springfield*, 35 Mo. Ap. 97; *Sidkum v. Wabash R. Co.*, 93 Mo. 400; *White v. Milwaukee Ry. Co.*, 61

Wis. 536; Railway Co. *v. Underwood*, 64 Tex. 463; *Sioux City R. Co. v. Finlayson*, 16 Neb. 578. In *Alabama Ry. Co. v. Hill*, 90 Ala. 71, 8 So. 90, it was held error to overrule a motion for the examination of plaintiff, a young woman of nervous temperament and delicate and refined feelings, who had already submitted to several examinations of her physicians, the proposed examinations not involving any ill consequences.

<sup>1</sup> *Miami, etc. R. Co. v. Bailey*, 37 O. St. 104; *Owens v. K. C. R. R. Co.*, 95 Mo. 196; *Shepard v. Mo. Pac. Ry. Co.*, 85 Mo. 629.

<sup>2</sup> *Schroeder v. Chicago, etc. R. Co.*, 47 Ia. 375.

insincerity should be first determined, so that the only question remaining to be determined is the present condition of the sexual organs of one or perhaps both parties.

**§ 704. Effect of decree—Whether divorce or annulment.** In the ecclesiastical law this was a suit for nullity, and the marriage was declared void *ab initio*. If our statutes are for the sole purpose of granting jurisdiction to the courts, then the proceeding is a nullity suit.<sup>1</sup> Where a statute permitted divorces for "impotency or adultery," the suit was considered a nullity suit." A similar construction was given the term, "the impotence of either party at the time of the marriage."<sup>2</sup> But from the expressions used in the various decisions, as well as the context of the statutory terms, it is apparent that the physical incapacity is mentioned as a cause for divorce.<sup>3</sup> This construction supposes a voidable marriage which the complainant has not consummated, but in fact affirms and asks to have dissolved. The question is not free from difficulty, and is so dependent upon the context of the statute that further discussion would be fruitless. A construction in accordance with the common law would require the decree to annul the marriage.<sup>4</sup>

**§ 705. Impotency renders the marriage voidable.—A** marriage is not void because one of the parties is impotent or physically incapable to consummate the marriage.<sup>5</sup> It was contended that such marriage was void, and therefore an impotent husband had no right to administration after the death of his wife; but the court held such marriage only voidable, observing that the practice of the courts, both temporal and spiritual, from all time, has been inconsistent with the attempt now made, and that it is not supported by

<sup>1</sup> *Bascomb v. Bascomb* (N. H.), 5 Foster, 267.

<sup>4</sup> *Chase v. Chase*, 55 Me. 21. And therefore no permanent alimony could be allowed.

<sup>2</sup> *Kempf v. Kempf*, 34 Mo. 211.

<sup>5</sup> A New Jersey statute at one time made such marriage void.

<sup>3</sup> Anonymous, 89 Ala. 291, 7 So. 100; *G. v. G.*, 33 Md. 401; *A. B. v. C. B.*, 34 N. J. Eq. 43; *Payne v. Payne*, 46 Minn. 467, 49 N. W. 230.

See reference to statute. *Gulick v. Gulick*, 12 Vroom, 13.

a single authority.”<sup>1</sup> The writer has found no exception to this rule from that time until the present. Indeed, the whole law of this subject is incompatible with void marriages, since the complainant may by acquiescence delay, or by insincerity waive, his right to have the marriage annulled.<sup>2</sup>

<sup>1</sup> *A. v. B.*, 1 P. & M. 559 (1868).

<sup>2</sup> *Elliott v. Gurr*, 2 Phillim. 16.

## CONSANGUINITY AND AFFINITY.

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§ 710. In general.

711. The Levitical degrees and  
the common law.  
712. How the degrees are com-  
puted.

§ 713. Consanguinity.

714. Affinity.  
715. Modern statutes.

**§ 710. In general.**—Consanguinity is the relation of persons descended from the same common ancestor, while affinity is the relation by marriage. Affinity exists between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband. There is no affinity between the blood relations of the husband and the blood relations of the wife.<sup>1</sup> Affinity ceases when the tie is broken by the death of one of the parties to the marriage without issue,<sup>2</sup> but continues so long as their issue is living.<sup>3</sup> The prohibition of marriage in these cases applies to relationship of the half blood as well as of the whole blood.<sup>4</sup> Generally the courts refuse to determine the validity of such marriage in a collateral proceeding.<sup>5</sup> And it seems that at common law the canonical disability of consanguinity and

<sup>1</sup> *Paddock v. Wells*, 2 Barb. Ch. 331. Conn. 88; *Dillworth v. Com.*, 10 Gratt. (Va.) 690; *Dearmond v. Dearmond*, 10 Ind. 191; *Cain v. Ingham*, 7 Cowen (N. Y.), 478.

<sup>2</sup> *Id.*; *Carman v. Newell*, 1 Denio (N. Y.), 26; *Mounson v. West, Leonard*, 88; *Blodgett v. Brinsmaid*, 9 Vt. 27. See *contra*, *Spear v. Robinson*, 29 Me. 531.

<sup>3</sup> *Paddock v. Wells*, 2 Barb. Ch. 331; *Trout v. Drawhorn*, 57 Ind. 570; *Winchester v. Hinsdale*, 12

<sup>4</sup> *Reg. v. Brighton*, 1 B. & S. 447.

<sup>5</sup> *Myatt v. Myatt*, 44 Ill. 473; *Boylan v. Dinzer*, 45 N. J. Eq. 485, 18 A. 119; *Sutton v. Warren*, 51 Mass. 451; *Buissiere's Succession*, 41 La. An. 217, 5 So. 668; *Elliott v. Gurr*,

affinity rendered the marriage voidable only, and valid as to all civil purposes unless sentence of nullity was rendered during the life-time of the parties.<sup>1</sup> Either party to such void marriage, or even interested third persons, may have such marriage declared void.<sup>2</sup> The fact that both parties are aware of the consanguinity is not a defense to the suit. In most of our states marriages are void for consanguinity, but in many states the marriage is deemed valid until it is annulled by a court of competent jurisdiction.<sup>3</sup> Thus in Pennsylvania a marriage of a man to his son's widow is declared void by statute; but after the death of the man, the widow is entitled to dower, as the validity of the marriage cannot be questioned after the death of one of the parties.<sup>4</sup> And this is held to be true at common law. A niece is entitled to the rights of a widow where she marries her uncle and survives him, if the question is not affected by statute and the marriage is not annulled during the life-time of both parties.<sup>5</sup>

**§ 711. The Levitical degrees and the common law.**—The statute of Henry VIII declared lawful all marriages “not prohibited by God’s law,” . . . and that “no reservation or prohibition, God’s law except, shall trouble or impeach any marriage without the Levitical degrees.” The terms “God’s laws” and “the Levitical degrees” are construed to be identical in meaning.<sup>6</sup> The English courts, in interpreting this statute, adopted the table of prohibited degrees published by Archbishop Parker. “These tables,” it was said, “do show the sense of the church of England, and so are a proper exposition of the law of God, and by

<sup>2</sup> Phillip. 16; Bonham *v.* Badgley, 7 Ill. 622; Stevenson *v.* Gray, 17 B. Mon. 193-215, 2 Cent. Law J. 340.

<sup>1</sup> Adkins *v.* Holmes, 2 Ind. 197, citing 2 Kent’s Com. 95; 1 Blackstone’s Com. 434; Shelford, Mar. & Div. 154; Gathng *v.* Williams, 5 Iredell, 487; Sutton *v.* Warren, 10 Metcalf, 451, 51 Mass. 451; Bonham *v.* Badgley, 2 Gilman, 622.

<sup>2</sup> Andrews *v.* Ross, 14 P. D. 15; Miles *v.* Chilton, 1 Rob. Ec. 684.

<sup>3</sup> Parker’s Appeal, 44 Pa. 309; Harrison *v.* S., 22 Md. 468; S. *v.* Barefoot, 2 Rich. 209.

<sup>4</sup> Walter’s Appeal, 70 Pa. 392.

<sup>5</sup> Bowers *v.* Bowers, 10 Rich. 551.

<sup>6</sup> Reg. *v.* Chadwick, 11 Q. B. 173.

consequence ought to have great weight with the judges when they expound the Levitical law."<sup>1</sup>

The statute of Henry VIII,<sup>2</sup> and this interpretation of it, is a part of our common law. The various states of the Union, however, have regulated the prohibited degrees to such extent that it is believed this portion of the common law is now no longer in force.

**§ 712. How the degrees are computed.**—The degrees of consanguinity and affinity are computed according to the rule of the civil law. Commencing with either of the persons related, the degrees are counted upward to the common ancestor, and then descending to the other person, reckon-

<sup>1</sup> *Butler v. Gastrill*, Gilb. Ch. 156. The table of prohibited degrees was as follows:

*A man may not marry his*

1. Grandmother.
2. Grandfather's wife.
3. Wife's grandmother.
4. Father's sister.
5. Mother's sister.
6. Father's brother's wife.
7. Mother's brother's wife.
8. Wife's father's sister.
9. Wife's mother's sister.
10. Mother.
11. Step-mother.
12. Wife's mother.
13. Daughter.
14. Wife's daughter.
15. Son's wife.
16. Sister.
17. Wife's sister.
18. Brother's wife.
19. Son's daughter.
20. Daughter's daughter.
21. Son's son's wife.
22. Daughter's son's wife.
23. Wife's son's daughter.
24. Wife's daughter's daughter.
25. Brother's daughter.
26. Sister's daughter.
27. Brother's son's wife.
28. Sister's son's wife.
29. Wife's brother's daughter.
30. Wife's sister's daughter.

*A woman may not marry her*

1. Grandfather.
2. Grandmother's husband.
3. Husband's grandfather.
4. Father's brother.
5. Mother's brother.
6. Father's sister's husband.
7. Mother's sister's husband.
8. Husband's father's brother.
9. Husband's mother's brother.
10. Father.
11. Step-father.
12. Husband's father.
13. Son.
14. Husband's son.
15. Daughter's husband.
16. Brother.
17. Husband's brother.
18. Sister's husband.
19. Son's son.
20. Daughter's son.
21. Son's daughter's husband.
22. Daughter's daughter's husband.
23. Husband's son's son.
24. Husband's daughter's son.
25. Brother's son.
26. Sister's son.
27. Brother's daughter's husband.
28. Sister's daughter's husband.
29. Husband's brother's son.
30. Husband's sister's son.

<sup>2</sup> 32 Hen. VIII, ch. 38.

ing a degree for each person, both ascending and descending.<sup>1</sup> The common ancestor is the trunk or common stock from which the relation branches out. According to this rule, the civil law counts the sum of degrees in both lines. The father stands in the first degree; the grandfather in the second degree; uncle in the third degree, and the cousins in the fourth degree. Lineal consanguinity is the direct line of descent as between the father, son, grandson and great-grandson, the latter being in the third degree. But in collateral consanguinity the parties, although descended from a common stock, are not direct descendants; as a man is collaterally related to his brother or sister in the second degree, to his nephew or niece in the third degree, and to his grand-nephew or niece in the fourth degree. Second cousins are related in the sixth degree of consanguinity, as will be seen by counting from one second cousin to the common ancestor (the great-grandfather), three degrees, and three degrees more in descending to the other second cousin. Affinity is calculated in the same manner. Where two men marry sisters they become related to each other in the second degree of affinity, as their wives are related in the second degree of consanguinity. The degree of consanguinity of the husband to a person is the same as the degree of affinity of the wife to that person.

**§ 713. Consanguinity.**—This incapacity to marry extends to all blood relationship of both the entire ascending and descending lineal, and to both lineal and collateral consanguinity of the first, second and third degrees of the civil-law rule. According to this rule, under the ecclesiastical law, which is part of our common law, a man could not marry his niece,<sup>2</sup> and a woman could not marry her nephew or other relative within the third degree. But a man may marry the widow of his great-uncle,<sup>3</sup> or cousins-german or other relatives of the fourth degree.

<sup>1</sup> 4 Kent Com. 412.

Con. 384; *Watkinson v. Mergatron*,

<sup>2</sup> *Woods v. Woods*, 2 Curt. Ec. T. Raym. 464.

516; *Burgess v. Burgess*, 1 Hagg.

<sup>3</sup> *Blackmore v. Brider*, 2 Phillim.

359.

**§ 714. Affinity.**—According to the ecclesiastical law, marriages were prohibited on the ground of affinity in the first, second and third degrees of the civil law. Under the English law,<sup>1</sup> a man is prohibited from marrying his deceased wife's sister;<sup>2</sup> his deceased wife's sister's daughter;<sup>3</sup> his deceased wife's mother's sister;<sup>4</sup> or his deceased wife's daughter by a former husband.<sup>5</sup> And a woman is prohibited from marrying her deceased husband's brother.<sup>6</sup> Since there is no affinity existing between the blood relations of the husband and blood relations of the wife, brothers may marry sisters, and father and son may marry mother and daughter; or a man marry the widow of his wife's brother. At one time affinity was created by precontract and by mere sexual intercourse, but this law was changed by subsequent legislation. Thus, before the act of Henry VIII, a man could obtain a decree annulling his marriage if he had, before marriage, committed adultery with his wife's mother. But after this act, it was held that the affinity which makes the subsequent marriage unlawful is created by marriage only.<sup>7</sup>

**§ 715. Modern statutes.**—In nearly all of the states the statutes specify the particular relationships within which marriages are prohibited; so that all marriages not among those enumerated will be deemed valid. In two states the statutes refer to the "Levitical degrees," and Archbishop Parker's table and its interpretation at common law is followed.<sup>8</sup> In many states the intermarriage of first cousins is prohibited;<sup>9</sup> while in other states marriages are prohibited

<sup>1</sup> 32 Hen. 8.

<sup>6</sup> *Aughtie v. Aughtie*, 1 Phillim.

<sup>2</sup> *C. v. Perryman*, 2 Leigh, 717; 201.

*Reg. v. Chadwick*, 11 Q. B. 173; *Kelly v. Scott*, 5 Gratt. 479; *Hutchins v. C.*, 2 Va. Cas. 331; *Com. v. Leftwich*, 5 Rand. 657.

<sup>3</sup> *Wortly v. Watkinson*, 2 Lev. 254.

<sup>4</sup> *Butler v. Gastril*, Gilb. Ch. 156.

<sup>5</sup> *Blackmore v. Brider*, 2 Phillim. 359.

<sup>7</sup> *Wing v. Taylor*, 2 Swab. & T. 278.

<sup>8</sup> Florida, Georgia,

<sup>9</sup> Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Montana, Nevada, New Hampshire, North and South Dakota, Ohio and Wyoming.

between persons "nearer of kin than first"<sup>1</sup> or "second cousins."<sup>2</sup> "Marriages are prohibited between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews," in the following states: California, Idaho, Missouri, Nebraska and New Mexico. To this the statutes of North and South Dakota add: "Between cousins of the half as well as of the whole blood," and "step-father with a step-daughter, or of a step-mother with a step-son." In some states the statutes declare that "No man shall marry his mother, grandmother, daughter, granddaughter, step-mother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, sister, brother's daughter, sister's daughter, father's sister, or mother's sister. No woman can marry her corresponding relatives."<sup>3</sup> Another common form of statute provides that "All marriages are forbidden between parents and children, including grand-parents and grand-children of every degree; between brothers and sisters of the one-half as well as the whole blood, and between uncles and nieces, aunts and nephews, and between first cousins."<sup>4</sup> The Maryland statute provides that "A man shall not marry his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, mother, step-mother, wife's mother, daughter, wife's daughter, son's wife, sister, son's daughter, daughter's daughter, brother's daughter or sister's daughter. A woman shall not marry her corresponding relatives."<sup>5</sup>

<sup>1</sup> Minnesota, North Carolina, Oregon and Wisconsin.

<sup>2</sup> Indiana, Ohio, Montana, Nevada, Washington.

<sup>3</sup> Maine, Massachusetts, South Carolina, Vermont.

<sup>4</sup> Arizona, Arkansas, Illinois, Kansas, Wyoming.

<sup>5</sup> The same statute is in force in New Jersey, Rhode Island and District of Columbia.

## MISCEGENATION.

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§ 716. In general

717. Mulatto.

718. Persons of color and white persons.

§ 719. Civil rights bill, or fourteenth amendment.

720. Such marriages valid unless declared void by statute.

**§ 716. In general.**—The state, under its power to control the domestic relations of its citizens, may prohibit the intermarriage of races. But such prohibition should be based upon some physiological reasons, such as are considered sufficient to interdict the intermarriage of cousins. It is purely a question of science whether or not the intermarriage of whites and blacks will cause a general decay of national strength, and whether their offspring will be sterile and of enfeebled constitution. When the various statutes prohibiting the intermarriage of whites and blacks were enacted it was not established as a scientific fact that such marriages produced enfeebled offspring. This legislation seems to have been actuated by race prejudice and a popular sense of superiority over an enslaved people. At the present time it is still a controverted question whether such marriages produce enfeebled and sterile offspring.<sup>1</sup> In one case such legislation is justified because: "It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments."<sup>2</sup> The difficulty of proving that such intermarriage produces sterility is apparent, for all other causes

<sup>1</sup> Tiedeman's Police Powers, 157.

<sup>2</sup> *S. v. Jackson*, 80 Mo. 175 (1888).

must be excluded. The opinion of a jurist is, however, entitled to some weight where the question is not of science exclusively, but in part a matter of common observation. Brown, C. J., declares that such law is "dictated by wise statesmanship, and has a broad and solid foundation in enlightened policy, sustained by sound reason and common sense. The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us that the offspring of the unnatural connections are generally sickly and effeminate, and that they are generally inferior in physical development and strength to the full blood of either race. It is sometimes urged that such marriages should be encouraged, for the purpose of elevating the inferior race. The reply is, that such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good."<sup>1</sup>

**§ 717. Mulatto.**—There is no uniformity of definition of the terms mulatto, negro, white person and colored person. A mulatto is properly defined as a person begotten by a white and a black. This would not include children of parents of mixed blood. The child of a white woman by a mulatto father is not a mulatto.<sup>2</sup> The children of a white and a mulatto, or children whose parents are not of pure blood, are not designated by any accurate term. In South Carolina, according to local usage, mulatto signifies "a person of mixed white or European and negro descent, in whatever proportions the blood may be mixed," so long as the proportion of black blood is visible.<sup>3</sup>

<sup>1</sup> Scott *v.* State, 39 Ga. 323 (1869). In this case it was held that a constitutional provision which declares that "the social status of the citizen shall never be the subject of legislation" does not repeal or render inconsistent the provision of the Georgia Code pro-

hibiting mixed marriages and declaring them null and void.

<sup>2</sup> Inhabitants of Medway *v.* National, 7 Mass. 88; Thurman *v.* S. S., 18 Ala. 276; Anderson's Law Dict., Mulatto.

<sup>3</sup> State *v.* Davis, 2 Bailey, 558; State *v.* Hayes, 1 Bailey, 275; John-

**§ 718. Persons of color and white persons.**—Negroes and all persons having a distinct admixture of African blood are properly termed “persons of color.”<sup>1</sup> Sometimes the statute fixes the generation at which the admixture is to be deemed indistinct. Thus, in Virginia, “every person having one-fourth or more negro blood shall be deemed a colored person.”<sup>2</sup> And in the absence of such statute a similar rule is observed.<sup>3</sup> These decisions are at variance with the general holding that all persons are white in whom the white blood predominates.<sup>4</sup> The term “white person” includes one nearer white than black or red,<sup>5</sup> but does not include a person half white and half Indian,<sup>6</sup> or a Mongolian.<sup>7</sup>

**§ 719. Civil rights bill, or fourteenth amendment.**—The power of the states to regulate marriages is an inherent power reserved because not expressly delegated to the national government.<sup>8</sup> The laws of states, prohibiting and providing punishment for the intermarriage of white persons and negroes, are not abrogated or in any way impaired by the civil rights bill of April 9, 1866, which provided, among other things: “That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the

son *v.* Boon, 1 Speers, 268. See, also, Daniel *v.* Guy, 19 Ark. 121; Dean *v.* Com., 4 Gratt. 541.

<sup>1</sup> Johnson *v.* Norwich, 29 Conn. 408; Van Camp *v.* Board of Education, 9 O. St. 411.

<sup>2</sup> McPherson *v.* Com., 28 Gratt. 939; Jones *v.* Com., 80 Va. 543.

<sup>3</sup> S. *v.* Dempsey, 9 Ire. Law, 384; Gentry *v.* McMinnis, 3 Dana, 382; S. *v.* Chavers, 5 Jones Law (N. C.), 11; P. *v.* Hall, 4 Cal. 399; S. *v.* Melton, Busbee, 49. See, also, White *v.* Tax Collector, 3 Rich. 136; Pauska *v.* Daus, 31 Tex. 67; People *v.* Dean, 14 Mich. 406.

<sup>4</sup> Bailey *v.* Fiske, 34 Me. 77; Lane

v. Baker, 12 Ohio, 237; Thacker *v.* Hawk, 11 Ohio, 376; Williams *v.* School Dist., Wright, 578. See dissenting opinion, P. *v.* Dean, 14 Mich. 406; Walker *v.* Brockway, 1 Mich. 57.

<sup>5</sup> Jeffries *v.* Ankeny, 11 O. 375; United States *v.* Barryman, 21 Alb. Law J. 194.

<sup>6</sup> Re Camille, 6 Fed. 256.

<sup>7</sup> Re Ah Yup, 5 Saw. 155.

<sup>8</sup> State *v.* Gibson, 36 Ind. 389, citing Lane Co. *v.* Oregon, 7 Wall. 76; Collector *v.* Day, 11 Wall. 113; Prigg *v.* Com., 16 Pet. 625; City of New York *v.* Miln, 11 Pet. 102, 139.

United States; and that such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every state and territory in the United States *to make and enforce contracts . . . as is enjoyed by white persons, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding.*" Nor are such state laws impaired by the similar provisions of the fourteenth amendment to the constitution, declaring that no state shall "deny to any person the equal protection of the laws."<sup>1</sup> The civil rights bill extended its protection to lawful contracts only, and did not contemplate marriages declared void by the laws of the state.<sup>2</sup> The state law abridges the rights of both parties, and punishes them with the same fines and penalties.<sup>3</sup> Judge Cooley<sup>4</sup> says: "Many states prohibit the intermarriage of white persons and negroes; and since the fourteenth amendment this regulation has been contested as the offspring of race prejudice, as establishing an unreasonable discrimination, and as depriving one class of the equal protection of the laws. Strictly, however, the regulation discriminates no more against one race than against another; it merely forbids marriage between the two. Nor can it be said to so narrow the privilege of marriage as practically to impede and prevent it. Race prejudice, no doubt, has had something to do with establishing this law, but it cannot be said to be so entirely without reason in its support as to be purely arbitrary. The general current of judicial decision is, that it deprives

<sup>1</sup> *Pace v. Alabama*, 106 U. S. 583; *son*, 80 Mo. 175; *State v. Gibson*, 36 *Green v. State*, 58 Ala. 190; *Ellis v. Ind.* 389; *Frasher v. S.*, 3 Tex. Ap. S., 42 Ala. 525; *Ford v. S.*, 53 Ala. 150; *State v. Hairston*, 63 N. C. 451; *State v. Reinhart*, 63 N. C. 547; *State v. Kenny*, 76 N. C. 251; *Burns v. State*, 48 Ala. 195; *Hoover v. State*, 59 Ala. 59; *State v. Jack-*

<sup>2</sup> *Ex parte Kinney*, 3 Hughes, 1, 263; *Lonas v. State*, 3 Heisk. 287.

<sup>3</sup> *Ex rel. Hobbs*, 1 Wood, 537; *Ex parte Fracois*, 3 Wood, 367.

<sup>4</sup> *Const. Law*, 228, 229.

a citizen of nothing that he can claim as a legal right, privilege or exemption."

**§ 720. Such marriages valid unless declared void by statute.**—The marriage of a white person with a negro or person of color is valid unless the statute expressly declares such marriage void. This is in conformity to the law of marriage under such disabilities as want of age or mental or physical incapacity. Such marriage may therefore be valid, although the statute makes it a crime punishable by fine or imprisonment. Generally the statutes declare such marriages void, and then no decree of nullity is necessary before contracting another marriage. If the statute declares that "the celebration of such marriage is forbidden and the marriage is void," the invalidity of the marriage may be shown in any proceeding.<sup>1</sup> Although the word "void" does not appear in the statute, the equivalent words may be sufficient to convey that meaning, as the declaration that "*marriage cannot be contracted* between a white person and a negro, a mulatto or person of mixed blood to the third generation inclusive."<sup>2</sup>

<sup>1</sup> Succession of Miniveielle, 15 La. An. 342.      <sup>2</sup> Carter v. Montgomery, 2 Tenn. Ch. 216.

## WANT OF AGE.

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### § 721. In general.

- 722. Consent of parents.
- 723. Affirming marriage.

### § 724. How marriage disaffirmed.

- 725. Statutes affecting the common-law age of consent.

**§ 721. In general.**—The incapacity to make valid contracts, which is termed infancy, continues as to both males and females until they reach the age of twenty-one. This incapacity to enter into contracts did not apply to the contract of marriage. The common law fixed the age of consent required for marriage at fourteen in males and twelve in females. This so-called "age of discretion" seems to have been based upon the probable time when the parties might attain puberty and thus be physically capable to bear children. These ages were regarded as conclusive proof of puberty at common law; but it seems that the canon law permitted proof of puberty to be made by actual inspection. These indecent examinations were not allowed in England or Scotland.<sup>1</sup> The ages at which puberty is generally attained is in fact somewhat later than that fixed by the canon law, which is supposed to have been based upon observations made in Italy, where development is more rapid than in northern latitudes. At all events, the common-law age of consent has been changed in many of the states, and a greater age required in every instance. No marriage had any effect at common law if the parties were less than seven years old. A marriage contracted by parties more than seven years old, but less than the age of consent, was not a mere nullity, but only an imperfect or inchoate marriage, which might be affirmed when the youngest party

<sup>1</sup> *Johnston v. Ferrier*, Mort. Dict. 8931.

became of age, and upon such affirmation would become a valid marriage without repeating a ceremony or its preliminaries.

§ 722. **Consent of parents.**—The consent of parents is required in nearly all the states in the Union where the parties are minors. Generally the consent is required unless the male is twenty-one and the female eighteen years of age. At the common law the consent of parents or guardians was not necessary to a valid marriage.<sup>1</sup> It is universally held that the failure to procure the consent of parents will not render the marriage void unless the statute expressly declares that such failure will render the marriage void.<sup>2</sup> This requirement, like the requirements of publication of banns, license, solemnization, return of marriage license, etc., is merely directory and penal. It is not the intention in such statutes to invalidate all marriages where there is no compliance with such regulations.<sup>3</sup> Thus the statute fixing the age of consent for males and females, and providing that parties under such age must first obtain the consent of their parents before a license shall be issued, is merely directory, and does not render a marriage void without such consent.<sup>4</sup> Nor is such a marriage void where the statute

<sup>1</sup> *Hargraves v. Thompson*, 31 Miss. 211; *S. v. Dole*, 20 La. An. 378; *Governor v. Rector*, 29 Tenn. 57; *Pearson v. Howey*, 6 Halstead (N. J. Law), 12.

<sup>2</sup> *Rex v. Birmingham*, 8 B. & C. 29 (1828); *Goodwin v. Thompson*, 2 Greene (Ia.), 329; *Parton v. Hervey*, 67 Mass. 119; *Caterall v. Sweetman*, 1 Rob. Ec. 304; *Milford v. Worcester*, 7 Mass. 48; *Hiram v. Pierce*, 45 Me. 367; *Ferrie v. The Public Adm.*, 4 Brad. (N. Y.) 28.

<sup>3</sup> *Pearson v. Howey*, 6 Halst. 12; *Askew v. Dupree*, 30 Ga. 173; *Courtright v. Courtright* (Ohio), 26 Week. Law Bul. 309; *De Barros v. De Barros*, 3 P. D. 1. For various

penalties for violating such statutes, see *S. v. Bittick*, 103 Mo. 183, 15 S. W. 325; *Wood v. Adams*, 35 N. H. 32; *Kent v. S.*, 8 Blackford, 163; *Smyth v. S.*, 13 Ark. 696; *Fitzsimmons v. Buckley*, 59 Ala. 539; *Adams v. Cutright*, 53 Ill. 361; *Ely v. Gammel*, 52 Ala. 584; *Vaughn v. McQueen*, 9 Mo. 330; *Robinson v. English*, 10 Casey, 324; *Cole v. Laws*, 108 N. C. 585, 12 S. E. 985; *Walker v. Adams*, 109 N. C. 481, 13 S. E. 907; *Maggett v. Roberts* (N. C.), 12 S. E. 890; *Riley v. Bell* (Ala.), 7 So. 155.

<sup>4</sup> *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63; *Hunter v. Milam* (Cal.), 41 P. 332.

contains the additional provision that "nothing in this act shall be construed so as to make the issue of any marriage illegitimate if the person or persons shall not be of lawful age."<sup>1</sup>

The object of the statutes requiring consent of the parents of minors is to prevent hasty, ill-considered and fraudulent marriages, to notify the parents, who are in most cases liable for the support of the pair, and ultimately to discourage marriages at an age when passions are ripe but reason and discretion are still immature. So grave are the evils of early and secret marriages that legislation in almost every state has required notice, consent of parents, license, etc. In England at one time it was thought advisable to declare void all marriages of minors not in widowhood (solemnized by license but not including marriage by banns), when entered into without the consent of the father, if living, or, if dead, of the guardian or of the mother, or of the court of chancery.<sup>2</sup> This statute was construed in the cases cited below.<sup>3</sup>

The effect of this unwise legislation was to make many children illegitimate and to leave the marriage relation open to attack at any time by either of the parties, or by the parents who had not consented to the marriage.<sup>4</sup> So great were the evils which arose from the act and the various interpretations of it, that it was subsequently repealed and a statute was enacted declaring that all the property accru-

<sup>1</sup> *Fitzpatrick v. Fitzpatrick*, 6 Nev. 407.

<sup>2</sup> *Lord Hardwicke's Marriage Act*, 26 Geo., 2, ch. 33, § 11.

<sup>3</sup> *Priestly v. Hughes*, 11 Eas. 1; *Days v. Jarvis*, 2 Hag. Con. 172; *Sullivan v. Sullivan*, 2 Hag. Con. 238; *Reddall v. Leddiard*, 2 Phillim. 356; *Johnston v. Parker*, 3 Phillim. 39; *Jones v. Robinson*, 2 Phillim. 285; *Smith v. Huson*, 1 Phillim. 287; *Hodgkinson v. Wilkie*, 1 Hag. Con. 262; *Cresswell v. Cousins*, 2 Phillim. 281; *Droney v. Archer*, 2 Phillim. 327; *Fielder v. Smith*, 2 Hag. Con. 193; *Clarke v. Hankin*, 2 Phillim. 328; *Duins v. Donovan*, 3 Hag. Ec. 301; *Rex v. James*, Russ. & R. 17; *Piers v. Piers*, 2 H. L. Cas. 331; *Rex v. Butler*, Russ. & R. 61; *Harrison v. Southampton*, 21 Eng. L. & Eq. 343.

<sup>4</sup> *Hayes v. Watts*, 3 Phillim. 43.

ing from the marriage shall be forfeited, thus depriving the guilty party of the pecuniary benefit which is commonly the inducement to such marriages.<sup>1</sup> Fortunately Lord Hardwicke's marriage act was enacted too late to become a part of our common law.<sup>2</sup> It is a piece of legislative folly from which many valuable lessons may be drawn. However unwise and undesirable child marriages may be, the true policy, consonant with good public morals and the best interests of the state, the parties and their offspring, is to preserve such unions when once made; declare their offspring legitimate, the marriage valid. Such policy is one of necessity; otherwise the validity of the marriage would always be open to attack. The common law has always proceeded upon this principle, holding the consent of the parties as sufficient without license or solemnization.

**§ 723. Affirming marriage.**— After both parties have attained the age of consent, they may affirm the marriage, and, when thus affirmed, it becomes valid without a new ceremony. A marriage may be affirmed by continuing to cohabit, by sexual intercourse, by the wife assuming the husband's name,<sup>3</sup> or by any other acts which show a desire to ratify the marriage and assume the marital relation. It seems that such marriage may be affirmed, although the statute has declared all marriages void where the "parties are unable to contract, or unwilling to contract, or fraudulently induced to contract."<sup>4</sup>

**§ 724. How marriage disaffirmed.**— According to common-law writers and some ancient authorities, the marriage of minors could not be affirmed or disaffirmed until they both reached the age of consent. It was supposed that this inchoate marriage must so remain until the parties were capable of contracting a new marriage. In other words, the

<sup>1</sup> *Rex v. Birmingham*, 8 B. & C. 173; *Governor v. Rector*, 29 Tenn. 29; Act of 3 G. 4, ch. 75, § 1; 19 and 57.

20 Vict. ch. 119, §§ 2-17.

<sup>3</sup> *Holtz v. Dick*, 42 O. St. 29.

<sup>2</sup> *Pearson v. Howey*, 6 Halstead (N. J.), 12; *Askew v. Dupree*, 30 Ga.

<sup>4</sup> *Smith v. Smith* (Ga.), 11 S. E. 496.

incapacity to contract marriage was also an incapacity to disaffirm. But the better opinion is that either party may, at any time before the age of consent, dissent to and disaffirm the marriage *in toto*.<sup>1</sup> "If the plaintiff had capacity to become a party to such imperfect and inchoate or conditional marriage, he should have capacity to disaffirm it at any time thereafter, before it has ripened into an absolute marriage, by invoking the authority of the court to annul it under the statute. No good reason is perceived why the parties should be compelled to remain in so unfortunate a position until the plaintiff becomes of age."<sup>2</sup>

<sup>1</sup>See Tyler on Infancy and Cov-  
erture, 126.

<sup>2</sup>Eliot v. Eliot, 77 Wis. 634, 46 N.  
W. 806.

Chancellor Kent (2 Com. 78), following Blackstone, said: "No persons are capable of binding themselves in marriage until they have arrived at the age of consent. Marriage before that age is voidable at the election of either party, on arriving at the age of consent, if either of the parties be under that age when the contract is made." In Co. Lit. 79, it is said: "The time of agreement or disagreement when they marry *infra annos nubiles*, is for the woman at twelve or after, and for the man at fourteen or after, and there need be no new marriage if they so agree; but disagree they cannot before the said ages, and then they may disagree and marry again to others without any divorce; and if they once after give consent, they can never disagree after." From the above statements of the common-law doctrine it would be inferred that no valid disaffirmance could be made before the common-law age of con-

sent. Whether this is true or not at common law, a disaffirmance under the age of consent has been recognized in our practice whenever it occurred. Consent may require intelligence usual to the age fixed by the law, but no policy of our law requires a like degree of discretion to disaffirm. Thus, in New York a man twenty-three years of age married an infant under twelve, who immediately declared her dissent to the marriage, and the court placed the infant under its protection and forbade him all intercourse or correspondence with her. Aymar v. Ruff, 3 Johns. Ch. 49. And in more recent decisions a disaffirmance before the statutory age of consent has been held sufficient. See Eliot v. Eliot, 77 Wis. 634. See same case, 46 N. W. 806 and 51 N. W. 81; Shafner v. State, 20 O. 1. The Michigan statute provides that "in no case shall such marriage be annulled on the application of the party who was of the age of legal consent at the time of the marriage." People v. Slack, 15 Mich. 193.

At any time before the youngest party arrives at the common-law age of consent, which we have seen was fourteen years in the male and twelve years in the female, either party may disaffirm the marriage. A man of thirty may marry a lass of eleven years and disaffirm such marriage at any time he chooses until she reaches the age of consent, after which he is bound or not at her election.<sup>1</sup> In ordinary contracts, only the minor may disaffirm; but in such marriages either party may disaffirm, for both parties must be bound or neither. It would seem that a judicial sentence of annulment would be necessary where such imperfect marriage has been disaffirmed.<sup>2</sup> This is especially true in our country at the present time when marriages are entered on public records, and this evidence may be used in the future to disturb titles and bastardize children. In Ohio, where the statutory age of consent is fixed at eighteen for males, a boy married when he was but sixteen, and disaffirmed the marriage at seventeen by marrying another with whom he cohabited after he was eighteen. This second marriage was held valid and the former void. The disaffirmance was pronounced valid, "for our law furnishes no method of obtaining a judicial sentence for annulling such a marriage; unless the parties have the means of escape in their own hands, none exists."<sup>3</sup> The Wisconsin statute provides that marriages voidable for want of age "shall be void from such time as shall be fixed by the judgment of a court of competent authority declaring the nullity thereof." It is further held that such a marriage is not an absolute nullity, but is only annulled from such time as shall be fixed by the judgment of the court, and that a party cannot disaffirm the first marriage by marrying another. Such second marriage is bigamy.<sup>4</sup>

**§ 725. Statutes affecting the common-law age of consent.—** It is a general rule that statutes in derogation of the

<sup>1</sup> *People v. Slack*, 15 Mich. 193; *Eliot v. Eliot*, 77 Wis. 634, 51 N. W.

81; *Shafher v. State*, 20 O. 1; *Walls v. S.*, 32 Ark. 565;

<sup>2</sup> But see *Walls v. S.*, 32 Ark. 565.

<sup>3</sup> *Shafher v. State*, 20 O. 1.

<sup>4</sup> *State v. Cone*, 86 Wis. 498, 57 N. W. 50.

common law are not extended by construction beyond their general meaning. If the statute modifies some period of time, that alone will not change the principles of the common law. Thus, the common-law age of consent is changed by a provision that "a male under the age of seventeen and a female under the age of fourteen years are incapable of contracting marriage." But such provision does not render a marriage of parties under these ages void. The manifest purpose of the enactment was to merely enlarge the age of consent from that fixed by the common law.<sup>1</sup> In North Carolina the age of consent is enlarged by a provision that "females under the age of fourteen and males under the age of sixteen years shall be incapable of contracting marriage."<sup>2</sup> Such provision, although it changed the ages of consent, was considered to leave the common law unaltered in respect to the validity of the marriage. In Iowa, the statute providing for the issuing of marriage licenses, and directing what officers may perform the ceremony, enacted, among other things, that "male persons of the age of eighteen years and female persons of the age of fourteen years, not nearer of kin than first cousins, and not having a husband or wife living, may be joined in marriage. *Provided always*, that male persons under twenty-one years, female persons under the age of eighteen years, shall first obtain the consent of their fathers respectively; or, in the case of the death or incapacity of their fathers, then of their mothers or guardians."<sup>3</sup> Such statute was held merely directory and penal. It was in effect merely cumulative, and did not change the common law. The marriage of a daughter fourteen years old, without the consent of her parents, was not void.<sup>4</sup>

The same interpretation has been placed upon similar statutes in other states.<sup>4</sup> When the statutes have raised the

<sup>1</sup> Beggs v. State, 55 Ala. 108.

<sup>4</sup> Parton v. Hervey, 67 Mass. 119;

<sup>2</sup> Koonce v. Wallace, 7 Jones' Fitzpatrick v. Fitzpatrick, 6 Nev. Law (N. C.), 194. 63; Bennett v. Smith, 21 Barb. 439.

<sup>3</sup> Goodwin v. Thompson, 2 Greene (Ia.), 329.

age of consent, the marriage does not become valid by ratification when the youngest party has reached the common-law age of consent, but is still inchoate and imperfect until such party affirms or ratifies the marriage after reaching the statutory age of consent.<sup>1</sup> The common-law age of consent is not abrogated by a provision of a penal code fixing the age under which a female shall be held incapable of consenting to unlawful carnal knowledge.<sup>2</sup>

<sup>1</sup> *Eliot v. Eliot*, 77 Wis. 634, 51 N. W. 81, citing *People v. Slack*, 15 Mich. 193; *McDeed v. McDeed*, 67 Ill. 546; *Holtz v. Dick*, 42 O. St. 23; *Shafher v. State*, 20 O. 1; *People v. Bennett*, 39 Mich. 208.      <sup>2</sup> *Fisher v. Bernard* (Vt.), 27 A. Barb. 316. But see *Bennett v. Smith*, 21 Hun, 288, where the question was raised but avoided.

## PARTIES.

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|----------------------------------------------------------|--------------------------------------------------------------------------------|
| § 726. Who may maintain a suit for divorce or annulment. | § 728. Coverture, infancy and guardianship.                                    |
| 727. Third persons as defendants — Right to intervene.   | 729. Insane persons as parties.<br>729a. Death of parties and revival of suit. |

**§ 726. Who may maintain a suit for divorce or annulment.**—The right to sue for divorce is a personal right and can only be exercised by one of the parties of the marriage. It is for the injured party to determine whether the cause for divorce shall be condoned, or whether it shall be the ground for an application to dissolve the marriage. The statutes require the plaintiff to verify the petition for divorce, and provide for no substituted verification as in other cases, and in other respects the provisions relating to suits for divorce evidently contemplate a suit by one of the married parties.<sup>1</sup> It is not certain that a third person could maintain such suit in the ecclesiastical courts.<sup>2</sup>

In the absence of any statute to the contrary it would seem that any interested party might maintain an action to have a void marriage declared to be so. Such marriage may be a cloud upon titles, or may entitle a reputed spouse to a

<sup>1</sup> *Mohler v. Shank's Estate (Ia.)*, 61 N. W. 981. The verification cannot be made by others. See *Daniels v. Daniels*, 56 N. H. 219; *Philbrick v. Philbrick*, 27 Vt. 786.

<sup>2</sup> In *Morgan v. Morgan*, 2 Curt. Ec. 679, a father was allowed to maintain a suit for separation on a showing that his son was a minor

and residing in the East Indies, and that the delay incident to obtaining the son's consent would result in a failure to preserve the evidence of the wife's adultery. The court heard the evidence, but before entering the decree required a proxy from the son confirming and ratifying the acts of his father.

distributive share of an estate. The right is not purely personal. A suit to annul will not abate upon the death of the parties.<sup>1</sup> No affirmation or ratification of either party can render it void, and there is no opportunity for the personal volition required in a suit for divorce. The ecclesiastical law permitted third persons to maintain an action to annul a void marriage, but such persons must have some interest in the marriage, either as heirs or as persons who might be liable for the support of the parties or their children.<sup>2</sup> But if the marriage is voidable it is clear that it is a personal action, dependent upon the will of the party to affirm or disaffirm the marriage. Our statutes relating to annulment of marriage are often so joined and mingled with divorce statutes that this form of action may be classified as a personal action, and cannot be maintained by an interested third party.<sup>3</sup>

**§ 727. Third persons as defendants — Right to intervene.**—In the divorce suit proper, in which no ancillary relief is prayed for, no third person will be allowed to intervene. The ecclesiastical practice permitted any person having an interest in the marriage to intervene in the nullity suit or in the suit for separation.<sup>4</sup> But this practice has not been adopted in this country, and the alleged paramour can-

<sup>1</sup>See *Sharon v. Terry*, 36 Fed. 337.

<sup>2</sup>Sherwood *v.* Ray, 1 Moore P. C. 253, was an action by the father to annul a void marriage of his daughter to a son-in-law, the marriage being void on account of incest, as the woman was the deceased wife's sister. See, also, *Ray v. Sherwood*, 1 Curt. Ec. 193; *Faremouth v. Watson*, 1 Phillim. 355; *Wells v. Cottam*, 3 Swab. & T. 364.

<sup>3</sup>Thus, in Maryland, a husband cannot maintain this action where his wife has procured a void di-

vorce and married another man, for the code provides that the suit can only be brought by either party. *Ridgely v. Ridgely* (Md.), 29 A. 597. Where a statute declares that a certain marriage, if contracted in good faith, shall be declared void only on the application of one of the parties, it is held to be a voidable marriage, and cannot be declared void on the application of creditors. *Cropsey v. McKinney*, 30 Barb. 47.

<sup>4</sup>See *Ray v. Sherwood*, 1 Curt. Ec. 173, and cases cited.

not intervene and contest the suit to protect his character.<sup>1</sup> In one case he was permitted to take part in the trial and cross-examine the witnesses.<sup>2</sup> But this practice is condemned, and he is refused the privilege where the suit is being contested in good faith.<sup>3</sup> It would seem to be the denial of an absolute right to hold that a person charged with adultery cannot become a party and protect his character by taking part in the issues. It is true, the alleged paramour is not bound by the decree, as it cannot be introduced as proof of the same adultery. But to deny this right opens the way for the parties to obtain a divorce by collusion and to obtain a finding which the party cannot contradict except collaterally in a suit for damages for slander and libel. To allow such intervention would permit the paramour to disprove false charges and expose collusion and thus discourage suits for divorce. In an action for divorce on the ground of adultery the paramour is a necessary party under the statutes now in force in England.<sup>4</sup>

Recently some of the eastern states have enacted statutes permitting the paramour to intervene and assist in the defense. This practice has some commendable features, as it permits the alleged paramour to explain his conduct and defend his reputation, when the defendant would permit the case to go by default in order to allow the plaintiff to procure a divorce. It allows the alleged paramour to have a standing as a party before the court, where an active and open defense may be maintained instead of giving the de-

<sup>1</sup> *Quigley v. Quigley*, 45 Hun, 23. *Long v. Long*, 15 P. D. 218; *Mason*

<sup>2</sup> *Clay v. Clay*, 21 Hun, 609.

*v. Mason*, 7 P. D. 233; *Ravenscraft*

<sup>3</sup> *Burke v. Burke*, 5 Misc. Rep. 319, 26 N. Y. Supp. 57. *v. Ravenscraft*, 2 P. & M. 376; *Lyne v. Lyne*, 1 P. & M. 508. But the

<sup>4</sup> *Wheeler v. Wheeler*, 14 P. D. 154; *Cox v. Cox*, 2 P. & M. 201; *Hawks v. Hawks*, 1 P. D. 137; *Hulse v. Hulse*, 2 P. & M. 357; *Nelson v. Nelson*, 1 P. & M. 510; *Conradi v. Conradi*, 1 P. & M. 163; *Cornish v. Cornish*, 15 P. D. 131; *Handcock v. Peaty*, 1 P. & M. 335; *Long v. Long*, 15 P. D. 218; *Mason v. Mason*, 7 P. D. 233; *Ravenscraft v. Ravenscraft*, 2 P. & M. 376; *Lyne v. Lyne*, 1 P. & M. 508. But the court may in its discretion proceed without such co-respondent when his name is unknown. *Pitt v. Pitt*, 1 P. & M. 464; *Jeffers v. Jeffers*, 2 P. D. 90; *Curling v. Curling*, 14 P. D. 13; *Jinking v. Jinking*, 1 P. & M. 330.

fendant secret assistance. A creditor cannot be made a party to a divorce suit, although his application alleges that the suit is collusive and that a divorce is sought by both parties in order to avoid his judgment.<sup>1</sup> He may, however, attend the trial and assist the court as a witness or *amicus curiae*. After a decree has been rendered annulling the marriage, the mother of the infant wife has no interest in the matter which will allow her to intervene and become a party to the suit, especially where the rights of an infant defendant have been protected by a guardian *ad litem*.<sup>2</sup> The court may hear her application to set aside the decree on account of fraud and collusion, but no appeal lies from his decision.<sup>3</sup> The children of the parties cannot have a judgment vacated on account of collusion, although they are as much affected by the decree as the parties themselves.<sup>4</sup> In a suit for divorce the plaintiff joined the husband, and also the woman who claimed to be his wife by a marriage subsequent to a decree of divorce. The husband denied the alleged marriage with the plaintiff and rested upon this issue. It was held that the interest of the second wife in this proceeding made her a proper party, and that the plaintiff could not dismiss the action until the rights of the second wife were adjudicated.<sup>5</sup> A decree of divorce will not be set aside on account of fraud and conspiracy of the parties to effect a marriage of the wife to another man, where the application to set aside the decree is made by the father of the second husband. The father has not sufficient interest in the former decree to have the same set aside, although the divorce was a part of a conspiracy to obtain the property of his son.<sup>6</sup>

It seems that a wife may intervene in a suit to vacate a

<sup>1</sup>Stearns *v.* Stearns, 10 Vt. 540.

<sup>2</sup>B. *v.* B., 28 Barb. 299.

<sup>3</sup>Id.

<sup>4</sup>Baugh *v.* Baugh, 37 Mich. 59.

<sup>5</sup>Winans *v.* Winans, 124 N. Y. 140, 26 N. E. 293.

<sup>6</sup>Simmons *v.* Simmons, 32 Hun,

551. In such case the court may make an order compelling the

father to pay the costs of the action, although the action is dismissed for want of jurisdiction.

decree of divorce, where her marriage subsequent to the decree would be void if the decree was vacated. For instance, a husband while his first wife was living married again. He then procured a decree declaring the second marriage void, and married a third wife. The second wife was allowed to open the decree on the ground of fraud, and to put in an answer alleging the validity of the marriage. In this proceeding the third wife was permitted to intervene and set up the validity of the third marriage, and to deny the validity of the second marriage.<sup>1</sup> In a suit for divorce it is not necessary to join the parents of the parties, although their parents are all parties to a marriage settlement which must be adjusted in case a divorce is granted.<sup>2</sup> The parents of the parties, and perhaps third persons, may intervene in a suit for divorce where the custody of the children of the parties is to be determined, and the court has the power to award the custody to parties other than the parents. Such practice is followed in England, but no instance is reported in America.<sup>3</sup>

Where the plaintiff seeks any ancillary relief by attachment, injunction, creditor's bill, or like process, all third persons who would be necessary parties in a direct proceeding may be made parties to the divorce suit. Any person is a proper party who is a creditor of the husband, or who has received a fraudulent conveyance of real or personal property from the husband, or who will be affected by the decree for permanent allowance or division of property if a divorce is rendered.

**§ 728. Coverture, infancy and guardianship.**—Generally the wife may sue or defend in her own name without the interposition of her next friend.<sup>4</sup> This was the practice in the ecclesiastical courts, and also under the divorce act.

<sup>1</sup> Anonymous, 15 Ab. Pr. (N. S.) to right of third persons to custody 307. See same case, 2 T. & C. (N. Y.) of children.

558.

<sup>4</sup> Barber *v.* Barber, 21 How. (U.S.)

<sup>2</sup> D'Auvillers *v.* Her Husband, 32 582; Sprayberry *v.* Merk, 30 Ga. 81; La. An. 605. Jones *v.* Jones, 18 Me. 308; Amos

<sup>3</sup> See cases cited in § 976, relating *v.* Amos, 4 N. J. Eq. 171; Wright

This practice is now regulated by statutes in most of the states, which authorize the wife to sue in her own name.

A guardian *ad litem* is generally required under the practice in the ecclesiastical courts and also in the modern courts of England and America where a party is not of age.<sup>1</sup> The general statute providing for the appointment of guardians *ad litem* is applicable to suits for divorce. Some forms of the statute may permit the infant to sue alone.<sup>2</sup> In Georgia, where the practice is not regulated by statute, it was held that an infant might bring a suit in her own right without a guardian. The reason assigned was that: "If a wife is of sufficient age to enter into a marriage, no good reason occurs to us why she may not maintain an action in the courts to dissolve it. . . . The complainant in this case was of lawful age to contract marriage and make a marriage settlement, and such contracts made by infant females being as binding upon them as if made by adults, it would seem that they would be as competent to maintain an action to dissolve the marriage contract, for any of the causes authorized by law, as an adult married woman would be."<sup>3</sup> This case seems to be correct in principle. The same principle applies to the action to annul the marriage. An infant who marries before the age of consent may, on arriving at that age, affirm or disaffirm the marriage. This right to disaffirm may be enforced by the minor before he arrives at majority by a suit to annul the marriage. "If the plaintiff," it is said, "had capacity to become a party to such imperfect and inchoate or conditional marriage, he should have capacity to disaffirm it at any time thereafter before it has ripened into an absolute marriage by invoking the authority of the court to annul it under the statute. No good reason is

v. Wright, 3 Tex. 168; Hawkins *v.* Hawkins, 4 Sneed, 105; Smith *v.* Smith, 4 Paige (N. Y.), 92. See *contra*, Lindemouth *v.* Lindemouth, 3 Leg. Opin. 242; Howard *v.* Lewis,

6 Phila. 50; Kenley *v.* Kenley, 2 How. (Miss.) 751.

<sup>1</sup> Bowzer *v.* Ricketts, 1 Hagg. Con. 213.

<sup>2</sup> Jones *v.* Jones, 18 Me. 308.

<sup>3</sup> Besore *v.* Besore, 49 Ga. 379.

perceived why the parties should be compelled to remain in so unfortunate a position until the plaintiff becomes eighteen years of age.”<sup>1</sup> The incapable party may bring a suit to annul a marriage without a guardian where the statute provides that, “when either of the parties to a marriage shall be incapable, from want of age or understanding, of contracting such marriage, the same may be declared void on application of the incapable party.”<sup>2</sup> A party under guardianship as a spendthrift is not for that reason incompetent to sue in his own name for divorce.<sup>3</sup> In case the defendant has been adjudged an habitual drunkard, it is not necessary to make defendants the committee who are appointed to take care of his estate.<sup>4</sup> The general rule is that the omission to procure the appointment of a guardian or *prochein ami* for an infant plaintiff is a mere irregularity not affecting the validity of the judgment.<sup>5</sup> The error is waived unless the objection is raised by a motion for nonsuit.<sup>6</sup>

**§ 729. Insane persons as parties.**—[It is an open question whether a divorce should be granted when one of the parties is insane.] The suit for divorce is based upon some marital wrong which the injured party may waive if he or she may desire. [It is a matter of personal volition whether the injured party, actuated by his own views of duty, propriety and religion, shall condone the offense or shall insist that the marriage shall be dissolved. Such volition cannot be exercised while the injured party is insane.] And so it is held that a next friend or guardian cannot make the election for the insane person and prosecute a divorce suit for him.<sup>7</sup> This is in harmony with the policy upon which the state has proceeded to permit divorces. No person is by our law

<sup>1</sup> Eliot *v.* Eliot, 77 Wis. 634, 51 N. W. 81.      <sup>6</sup> Blood *v.* Harrington, 8 Pick. 552; Fitch *v.* Fitch, 18 Wend. 513.

<sup>2</sup> Pence *v.* Aughe, 101 Ind. 317.

<sup>7</sup> Worthy *v.* Worthy, 36 Ga. 45,

<sup>3</sup> Richardson *v.* Richardson, 50 Vt. 119.

91 Am. D. 758; Bradford *v.* Abend, 89 Ill. 78, 31 Am. R. 67; Birdzell *v.*

<sup>4</sup> Gregg *v.* Gregg, 48 Hun, 451.

Birdzell, 33 Kan. 433; Mohler *v.*

<sup>5</sup> Tyler on Infancy, page 196; Wolford *v.* Oakley, 43 How. Pr. 118.

Shank's Estate (Ia.), 61 N. W. 981.

commanded to obtain divorce because some consideration of public morals or common propriety demands that the comfort, and apparently the best interests of the parties, would be best subserved by a dissolution of the marriage. The state, in effect, says to the injured party, it is for you, and you alone, to determine whether it is your duty to suffer the wrongs that have been inflicted upon you; whether you can be reconciled to continue cohabitation with the wrong-doer with a hope of reforming him; or whether, under all the circumstances, the situation has become so intolerable that in your opinion a divorce is the last resort. The state, however, allows the guardian of an insane person to bring any suit necessary to enforce his legal rights in all other cases. But it is conceded that such suits, being for the protection of property rights of the insane person, are always for his best interest.

There is another and, perhaps, better reason than the one above stated for refusing the application of a guardian of an insane party for the dissolution of the marriage. The absolute divorce dissolves the marriage, the common property of the parties is divided, and the custody of the children is provided for. The defendant may marry another. So that if the insane person is restored to reason and desires to disaffirm all that has been done by the guardian, she will find that her property and marital rights have been adjusted and that her only choice is to affirm what has been done. If a decree of separation had been granted this reason would not apply, for the defendant could not have entered into a valid marriage and the property would not be divided.<sup>1</sup>

<sup>1</sup>In *Mohler v. Shank's Estate* (Ia.), 61 N. W. 981, the guardian of an insane husband brought suit for divorce on the ground of the wife's adultery. It was shown that the wife had a bastard child. During the suit the guardian and the wife entered into an agree- ment by which the wife was to receive a gross sum in lieu of alimony and her right of dower, and this agreement was approved by the court and entered as a part of the decree, and the amount was paid to the wife. On the death of the husband the wife brought a

The guardian or next friend of an insane person is authorized in some states to prosecute a suit for divorce.<sup>1</sup> Such statutes are desirable, because there are circumstances in which it is clear that the insane person would seek a divorce if he had the mental capacity to do so, and in such cases the guardian or the court, or both of them, should have the power to carry on a divorce suit.<sup>2</sup> The foregoing reasons do not apply to a suit for a separation or alimony. This is a proper proceeding for the guardian to bring, for he can determine for the insane person the absolute necessity of a separation and alimony.<sup>3</sup> On attaining reason, the insane person may disaffirm the separation and continue the marital relation, since the defendant could not marry another during the separation. This form of relief could be obtained by a guardian for the insane person in the ecclesiastical courts,<sup>4</sup> and also in the modern divorce court.<sup>5</sup> The relief is also granted in our country, unless the statutes interfere.<sup>6</sup> If a cause for divorce must be proved in order to recover alimony, it is held that the guardian of the insane person cannot bring the action, for he cannot elect for the insane person in such case for the same reasons that he cannot elect to have the marriage dissolved.<sup>7</sup>

suit for a distributive share of the estate on the ground that she was a lawful widow of deceased. It was held that such decree was void, but having accepted the benefits of the decree she was estopped to deny its validity.

A decree of divorce obtained in the name of the wife by the husband, while the wife is insane and confined in an asylum, is void for collusion, and will be set aside on the application of her conservator. *Bradford v. Abend*, 89 Ill. 78.

<sup>1</sup> See form of statute in *Thayer v. Thayer*, 9 R. I. 377; *Cowan v. Cowan*, 139 Mass. 877; *Garnett v. Garnett*, 114 Mass. 379; *Little v. Lit-*

*tle*, 13 Gray, 264; *Denny v. Denny*, 8 Allen, 311; *Fegan's Estate*, *Myrick*, Prob. 10. The guardian of an insane person is authorized to sue by the English divorce act. *Baker v. Baker*, 5 P. D. 142; s. c., 6 P. D. 12; *Fry v. Fry*, 15 P. D. 50.

<sup>2</sup> *Bishop*, Mar., Sep. & Div., § 525.

<sup>3</sup> "While this sort of divorce is never fit for the sane," says Mr. Bishop, "it may often be good for the insane."

<sup>4</sup> *Parnell v. Parnell*, 2 Hagg. Con. 169.

<sup>5</sup> *Woodgate v. Taylor*, 2 Swab. & T. 512.

<sup>6</sup> *Mims v. Mims*, 33 Ala. 98.

<sup>7</sup> It was held in *Birdzell v. Bird-*

[No good reason can be given why a guardian cannot prosecute a suit to have a marriage of an insane person annulled on account of a prior marriage undissolved, or in other cases where the marriage is absolutely void and cannot be ratified. No volition or election of the insane party can change her *status.*] The best interest of the parties as well as the state requires that a court of competent jurisdiction should declare such marriage void during the life-time of the parties, and before property rights become entangled. But if the marriage is voidable, as for want of age, impotency, fraud or duress, the suit is somewhat similar to an action to dissolve the marriage and might depend upon the

zell, 33 Kan. 433, that a guardian of an insane person could not maintain an action for divorce or for alimony without divorce. As to the suit for divorce it was said: "The injured party may be willing to condone the wrong, or, for reasons satisfactory to himself or herself, may desire to continue the marriage relation, notwithstanding the wrong. In the present case, some of the wrongs charged against the defendant existed prior to the insanity of the plaintiff. Can the guardian say that she did not condone them? . . . Whether a party who is entitled to divorce shall commence proceedings to procure the same is purely a personal matter resting solely with the injured party, and it requires an intelligence on the part of such party to commence the proceedings, and such an election cannot be had from an insane person." As to alimony, it was said that the statute did not permit such action. The statute provided that "The wife may obtain alimony from the

husband without a divorce, in an action brought for that purpose in the district court, for any of the causes for which a divorce may be granted. The husband may make the same defense to such action as he might to an action for divorce, and may, for sufficient cause, obtain a divorce from the wife in such action." Civil Code, 649. It was said, "Can a husband obtain a divorce from an insane wife? Can a guardian defend her? She has a right to testify in a divorce case. Can her guardian supply such testimony? A part of the grounds for divorce and alimony in the present case existed before the defendant became insane. Can the guardian say that she did not condone the wrongs upon which these grounds rest? . . . There are better remedies to enforce this support than the strange one resorted to in the present case. There are all the common-law remedies, and there are the further remedies furnished by the statutes."

same reasons; as in either action the plaintiff can preserve the marriage by affirming it, or refusing to have it annulled.

The fact that a defendant is insane when a divorce suit is brought may delay the proceeding if there is hope of his recovery.<sup>1</sup> But if the insanity is incurable, the plaintiff will not be debarred of her right to a divorce for an act committed while sane.<sup>2</sup> The fact that a defendant was insane did not relieve him from any liability at common law, although courts of chancery might interfere by injunction in order that all the lunatic's debtors might have their claims tried in one proceeding.<sup>3</sup> No good reason appears why a defendant should be relieved from the consequences of his marital wrongs, any more than liabilities, on account of supervening insanity. The proceeding is, however, much embarrassed by his inability to make a proper defense. There is no doubt the insane defendant should be represented by his guardian, who should interpose every defense and protect all his rights. If the facts justify, the guardian may set up causes for divorce in a cross-bill and ask for affirmative relief, and also any ancillary relief to which the party may be entitled. The rights of the insane defendant should be protected by every favor which the court has the discretionary power to grant, either in setting aside defaults,<sup>4</sup> or in other proceeding, after the decree has been entered.<sup>5</sup> In no case should a party urge the insanity of the opposing party in order to defeat a right of an insane party or to do him an injustice.<sup>6</sup>

<sup>1</sup> *Stratford v. Stratford*, 92 N. C. 297.

<sup>2</sup> *Id.; Rathbun v. Rathbun*, 40 How. Pr. 328; *Mordaunt v. Moncreiffe*, L. R. 2 H. L. Sc. 874; *Mordaunt v. Mordaunt*, 2 P. & M. 103. See *contra*, *Bawden v. Bawden*, 2 Swab. & T. 417.

<sup>3</sup> See *Buswell on Insanity*, §§ 122-124.

<sup>4</sup> *Cohn v. Cohn*, 85 Cal. 108.

<sup>5</sup> *Tiffany v. Tiffany*, 84 Ia. 122, 50 N. W. 554.

<sup>6</sup> *Allen v. Berryhill*, 27 Ia. 534. In *Douglass v. Douglass*, 31 Ia. 421, the wife sued for divorce on the ground of desertion, and the husband's defense was that he was insane during part of the period and was not wilfully absent. The wife proved that the husband deserted her before he became insane, and

**§ 729a. Death of parties and revival of suit.**—Upon the death of either party the suit terminates and cannot be revived.<sup>1</sup> It is a personal action, and abates with the death of one party.<sup>2</sup> The suit for divorce is generally prosecuted to obtain a dissolution of the marriage, the custody of the children and the right to marry again. If death confers this relief the decree of the court is anticipated, and it would be useless to enter it.<sup>3</sup> For the same reason the suit for alimony will abate, as the wife can obtain her portion of the estate.<sup>4</sup> The death of one party after the cause has been submitted will dissolve the marriage, and the court cannot enter a decree of divorce and alimony and direct that the decree relate back to a period before the defendant's death; for the relationship has ceased and the rule does not apply to such a case.<sup>5</sup> But another court has held that such decree may be entered as of the date of submission.<sup>6</sup> Where the defendant died during the trial and before the retirement of the jury, the decree was entered as of the first day of the term.<sup>7</sup> The rule stated in *Wilson v. Wilson* is consonant with reason and the nature of the situa-

after his recovery and release from the asylum he declared he never intended to live with her again. Afterwards he became insane again and continued to be so at the time of the suit. It was held that he had deserted the wife without reasonable cause, and a divorce was granted.

<sup>1</sup> *Grant v. Grant*, 2 Swab. & T. 522; *Brocas v. Brocas*, 2 Swab. & T. 383; *Downer v. Howard*, 44 Wis. 82; *Sackett v. Giles*, 3 Barb. Ch. 204; *Barney v. Barney*, 14 Ia. 189; *O'Hagan v. O'Hagan's Ex.*, 4 Ia. 509.

<sup>2</sup> *McCurley v. McCurley*, 60 Md. 185, 45 Am. R. 717; *Barney v. Barney*, 14 Ia. 189; *Ewald v. Corbett*, 32 Cal. 493; *Pearson v. Darrington*, 32 Ala. 227.

<sup>3</sup> *Kimball v. Kimball*, 44 N. H. 122; *Stanhope v. Stanhope*, 11 P. D. 103; *Zoellner v. Zoellner*, 46 Mich. 511.

<sup>4</sup> *Swan v. Harrison*, 42 Tenn. 534; *McBee v. McBee*, 48 Tenn. 558; *McCallum v. McCallum*, 48 Tenn. 565. But temporary alimony accruing before defendant's death may be recovered. *Francis v. Francis*, 31 Gratt. 283.

<sup>5</sup> *Wilson v. Wilson*, 73 Mich. 620, 41 N. W. 817.

<sup>6</sup> Gantt, J., in *Mead v. Mead*, 1 Mo. Ap. 247, citing *Cent. Sav. Bank v. Shine*, 48 Mo. 456, and the ancient practice in England, stated in *Cumber v. Wane*, 1 Stra. 426.

<sup>7</sup> *Webber v. Webber*, 83 N. C. 280.

tion, and the latter cases are wrong in applying the doctrine of relation to actions for divorce and alimony.<sup>1</sup> In such proceeding the heirs are necessary parties.

It has been held that an appeal from a decree of divorce abates upon the death of either party, and, as the action could not be revived, the decree became inoperative.<sup>2</sup> If a decree dismisses the suit and denies divorce, it will abate on the death of either party and cannot be revived, as no party could maintain the action.<sup>3</sup> But if the suit is to annul a void marriage it is probable that the court would permit the suit to be revived, and the persons interested to be parties, for the purpose of protecting property interests dependent upon the marriage.<sup>4</sup> If the deceased had no property and there was no issue of the alleged marriage, a decree dismissing a nullity suit will not be revived, as a decree of nullity would be useless and inoperative.<sup>5</sup> The objections that a suit for a dissolution of the marriage cannot be revived because the suit has abated as to the subject-matter, and can only be revived by those interested in the subject-matter and not in the consequences of the suit; or that, if the decree is reversed, no new trial can be granted, have not been approved by the courts.<sup>6</sup> The right of appeal will not be denied for such reasons. The *status* of the defendant is not restored by the death of the party obtaining the decree. The party against whom the decree was obtained

<sup>1</sup> Where an absolute divorce was granted and the question of alimony was reserved in the decree for the further order of the court, the death of the husband will not prevent the court from granting permanent alimony out of the decedent's estate. *Seilby v. Ingham* (Mich.), 63 N. W. 528.

<sup>2</sup> *Barney v. Barney*, 14 Ia. 189. In *Thomas v. Thomas*, 57 Md. 504, the husband died before the wife had perfected her appeal from a decree divorcing her from her hus-

band. No proceedings were taken to revive the suit in the lower court according to the provisions of the code which were applicable in such case. Held, that a revivor could not be had in the supreme court.

<sup>3</sup> *Downer v. Howard*, 44 Wis. 82.

<sup>4</sup> *Id.*

<sup>5</sup> *Wren v. Moss*, 2 Gilm. (7 Ill.) 72, approved in *Israel v. Arthur*, 6 Colo. 85.

ought not to be concluded by the death of the successful party, if any property rights are involved. An appeal is said to lie in such case "to restore the survivor to his or her rights of property divested erroneously by the decree. On the reversal of a decree of divorce, the parties will be placed in the position they occupied before the decree was entered, and, if one of them has died between the date of the decree of divorce and its reversal, the survivor procuring the reversal will be entitled to all rights of succession or dower, and the like, in the estate of the other, the same as if no divorce had ever been had; but in such case the court need not ordinarily remand the case, as no other decree of divorce can ever be had."<sup>1</sup>

A rule of law should extend no further than the reason upon which it proceeds. If a divorce suit abates beyond revivor, for the reason that death grants all the relief that the decree of divorce would confer, then the rule does not apply where property rights and the interests of third persons are concerned. Then the suit may be revived and a decree rendered adjudicating the rights of all parties.<sup>2</sup> A suit to annul a marriage should not abate on the death of one of the parties. It is not a suit to dissolve the marriage; nor is it a proceeding in which the relief sought is made un-

<sup>1</sup> *Danforth v. Danforth*, 111 Ill. 236. cases cited in procedure in vacating decree for fraud, § 1057.

Where it is sought to appeal from a decree of divorce after the death of one of the parties, or where one party dies after the appeal is taken, the proper practice is to join all parties who may be affected by a reversal of the decree. In such case the administrator is not the only necessary party, but his heirs at law must be joined. *Israel v. Arthur*, 6 Colo. 85; *Danforth v. Danforth*, 111 Ill. 236; *Shafer v. Shafer*, 30 Mich. 163; *Wren v. Moss*, 2 Gilm. 72. See also

In a suit to vacate a decree for fraud, all the heirs must be made parties. *Howard v. Howard*, 47 How. Pr. 240; *Boyd's Appeal*, 38 Pa. St. 241.

The death of one of the divorced parties will not prevent the vacation of a decree obtained by fraud. § 1054.

<sup>2</sup> *Thomas v. Thomas*, 57 Md. 504; *Webber v. Webber*, 83 N. C. 280; *McCurley v. McCurley*, 60 Md. 185; *Wren v. Moss*, 7 Ill. 72; s. c., 2 Gilm. 72.

necessary by the death of one party. The relief is the very opposite of a dissolution, for the prayer is for the adjudication that an assumed marriage is not and has not been a real and valid marriage. The ecclesiastical courts, however, refused to annul a marriage and bastardize the issue after the death of one of the parties, but the validity of the marriage could be attacked in other courts in collateral proceedings.<sup>1</sup> And this seems to be the law in our states, although the decisions are governed by statutory provisions.<sup>2</sup> As the law now stands, the action to annul the marriage abates on the death of one party, and the action cannot be revived in the name of the legal representatives of the deceased.<sup>3</sup> The legitimacy of every child of the parties, and the title to all their real estate, and all other questions which may arise concerning the marriage, must be determined by separate suits in any state in which the questions may arise at any time in the future.<sup>4</sup> The litigation that arose out of the *Gaines* marriage is a good illustration of the numerous suits that may thus arise.<sup>5</sup> And the alleged marriage with Senator Sharon was the subject of a litigation equally famous and complicated.<sup>6</sup> Experience has shown that the validity of a marriage should be determined during the life-time of both parties. But the statute of every state should permit the nullity suit to proceed after the death of one party. Or if both parties are dead the interested parties should be al-

<sup>1</sup> *Hinks v. Harris*, 4 Mod. Rep. 182 (1793); *Hemming v. Price*, 12 Mod. Rep. 432; *Brownsword v. Edwards*, 2 Ves. Sr. 245 (1750).

<sup>2</sup> See §§ 568, 569; *Rawson v. Rawson*, 156 Mass. 578, 31 N. E. 653; *Pingree v. Goodrich*, 41 Vt. 47.

<sup>3</sup> *Id.*

<sup>4</sup> *Fornshill v. Murray*, 1 Bland (Md.), 479 (1836).

<sup>5</sup> See *Gaines v. Chew*, 2 How. (U. S.) 619; *Patterson v. Gaines*, 6 How. (U. S.) 550; *Gaines v. Relf*, 12 How. (U. S.) 472; *Gaines v. Hen-*

*nen*, 24 How. (U. S.) 553; *Gaines v. New Orleans*, 6 Wall. 642; *Gaines v. De La Croix*, 6 Wall. 719; *New Orleans v. Gaines*, 15 Wall. 624; *Gaines v. Fuentes*, 2 Otto, 10; *Davis v. Gaines*, 104 U. S. 386; *Ex parte Whitney*, 13 Peters, 404.

<sup>6</sup> *Sharon v. Terry*, 36 Fed. 337; *Sharon v. Hill*, 20 Fed. 1; *Ralston v. Sharon*, 51 Fed. 702; *Sharon v. Sharon*, 67 Cal. 185; *id.* 68 Cal. 326, *id.* 75 Cal. 1, 19 P. 345; *id.* 79 Cal. 633, 22 P. 26; *id.* 84 Cal. 424, 23 P. 1100.

lowed to go before a proper tribunal, and determine the validity of the marriage in one proceeding, and thus avoid a multiplicity of suits.<sup>1</sup>

<sup>1</sup> An action to annul a marriage on the ground of a prior marriage undissolved cannot be maintained by the administrator of the intestate against the widow. But the probate court, in the distribution of the estate, has a right to determine the validity of the marriage. *Pingree v. Goodrich*, 41 Vt. 47. Where the marriage was contracted in good faith, but it is subsequently discovered that the marriage is void because the wife has a former husband living, the wife cannot maintain an action against the heirs of the deceased husband to have the marriage declared void and to declare legitimate her son by deceased. The statute contemplates proceedings in such cases between the original parties while both are alive. *Rawson v. Rawson*, 156 Mass. 578.

## PLEADING.

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**§ 730. The petition.**—The pleading filed by the plaintiff at the commencement of the action is known by the various names of petition, complaint, bill or libel, according to the practice in the different states. No particular form of this pleading is required. It is clear that the petition need not conform to the libel in the ecclesiastical courts, which alleged all the facts both ultimate and probative, was redundant with quaint phraseology, and stated conclusions of law. It was evidently framed to suggest the questions for the examination of witnesses, to search the conscience of the defendant and obtain from him admissions under oath. The modern petition must be brief, avoiding statements of the evidence and conclusions of law. It must state a cause for divorce and all the other facts required by the statute, such as the necessary residence within the state and the plaintiff's good conduct and freedom from connivance or collusion. No proof should be received without the proper allegations.<sup>1</sup> If the petition is defective the court may grant

<sup>1</sup> *Moores v. Moores*, 16 N. J. Eq. 275; *McQueen v. McQueen*, 82 N. C. 471; *Hare v. Hare*, 10 Tex. 355.

leave to amend, and if this is not done the action must be dismissed.<sup>1</sup> Immaterial or scandalous matter will be stricken out as in other cases.<sup>2</sup> If the pleading state a cause of action it will be sustained, and any minor defects will be waived by answering to the merits.<sup>3</sup> The petition must comply with local statutes and practice and be signed by the party or his attorney.<sup>4</sup>

**§ 731. Allegation of jurisdiction.**—In nearly all the states the plaintiff or one of the parties is required to reside a given time within the state before the commencement of the action. This domicile within the state is therefore a fact giving the court the jurisdiction to hear and determine the cause. Where the petition does not state that the plaintiff has resided in the state for the time required by the statute, the action should be dismissed for want of jurisdiction.<sup>5</sup> Such allegation is as necessary as the allegation of citizenship of another state which gives the federal courts jurisdiction.<sup>6</sup> It is a condition precedent to obtaining the relief demanded,<sup>7</sup> and is as necessary as the allegation of

<sup>1</sup> *Densmore v. Densmore*, 6 Mackey, 544; *Wright v. Wright*, 6 Tex. 3. See Amendments, § 741.

<sup>2</sup> *Price v. Price* (N. J. Eq.), 3 A. 729; *Moore v. Moore*, 7 Phil. 617; *Burns v. Burns*, 60 Ind. 259; *Klein v. Klein*, 42 How. Pr. (N. Y.) 166.

<sup>3</sup> *Conant v. Conant*, 10 Cal. 249; *Carrillo v. Carrillo*, 6 N. Y. Supp. 305; *Brick v. Brick*, 65 Mich. 230; *Huston v. Huston*, 63 Me. 184.

<sup>4</sup> *Daniels v. Daniels*, 56 N. H. 219; *Willard v. Willard*, 4 Mass. 506; *Philbrick v. Philbrick*, 27 Vt. 786.

For forms of petitions for divorce see § 751 to § 759.

Petition for divorce on account of cruelty, § 752.

Petition for annulment of marriage, §§ 755, 756.

Petition for alimony without divorce, § 759.

Applications for alimony, § 760.

<sup>5</sup> *Pate v. Pate*, 6 Mo. Ap. 49; *Richardson v. Richardson*, 50 Vt.

119; *Jarvis v. Jarvis*, 3 Edw. Ch. 462; *Mix v. Mix*, 1 John. Ch. 204; *Powell v. Powell*, 53 Ind. 513; *Huston v. Huston*, 63 Me. 184; *White v. White*, 45 N. H. 121; *Kimball v. Kimball*, 13 N. H. 222; *Batchelder v. Batchelder*, 14 N. H. 380; *Smith v. Smith*, 12 N. H. 80; *Young v. Young*, 18 Minn. 90; *Greenlaw v. Greenlaw*, 12 N. H. 200; *Phelan v. Phelan*, 12 Fla. 450.

<sup>6</sup> *Erwin v. Lowry*, 7 How. (U. S.) 172, reversing 6 Rob. 203. It seems that the falsity of such allegation will not make the judgment void. For usual form of this allegation see Petitions for divorce, § 751.

<sup>7</sup> *Eastes v. Eastes*, 79 Ind. 363; *Irwin v. Irwin* (Okl.), 41 P. 369.

marriage.<sup>1</sup> It has been held that without such allegation the decree is void, having been *coram non judice*.<sup>2</sup> But it seems that a failure to allege a residence in the county for the required time will not render the decree void and subject to collateral attack.<sup>3</sup>

Usually the statutory expression concerning domicile should be followed, but a departure from it will not be fatal if the facts conferring jurisdiction can be gathered from the entire pleading. The expression "usually resides" is satisfied by an allegation that plaintiff "now resides and for some while has resided in this county."<sup>4</sup> But under a statute requiring that the plaintiff "shall at the time of exhibiting his petition be an actual *bona fide* inhabitant of the state, and shall have resided in the county where the suit is filed six months preceding the filing of the suit," it is not sufficient to allege that "plaintiff is a *bona fide* citizen of the county of Bell, state of Texas, and has been for more than six months before the filing of this petition," as he may not be the actual *bona fide inhabitant* required by the statute.<sup>5</sup> Where the statute provides that "no divorce shall be granted to any applicant unless it shall appear that such applicant has resided in the state of Florida for the space of two years prior to the time of such application," the court will not obtain jurisdiction by an allegation that "the complainant is, and has been for more than two years, a resident of this state, and that the parties were married in Jacksonville, in this state, according to law, in April, 1862, where the parties have ever since lived." Both the allegation of marriage and of jurisdiction are defective.<sup>6</sup> Where the statute requires a residence of "one whole year next before filing the petition," an allegation that the plaintiff

<sup>1</sup> Bennett v. Bennett, 28 Cal. v. Gant, 49 Mo. Ap. 3, denying Pate 599. v. Pate, 6 Mo. Ap. 49.

<sup>2</sup> Cole v. Cole, 3 Mo. Ap. 571.

<sup>4</sup> Lochnane v. Lochnane, 78 Ky.

<sup>3</sup> Werz v. Werz, 11 Mo. Ap. 26. 467.

In a later case it is held that the allegation as to the residence in the county is not necessary. Gant 5 Haymond v. Haymond, 74 Tex. 414. 6 Burns v. Burns, 13 Fla. 369.

"has for more than one year prior to the filing of this petition been a resident," is insufficient.<sup>1</sup>

**§ 732. How marriage alleged.**—The marriage of the parties is a necessary allegation in every proceeding for divorce or annulment.<sup>2</sup> Unless there has been a valid marriage there is no cause of action in either case, for there is nothing to dissolve or annul.<sup>3</sup> It is not necessary to allege the courtship, though such was the ecclesiastical practice.<sup>4</sup> It is customary to allege the wife's maiden name, whether she be plaintiff or defendant, as such allegation helps to identify the wife and to explain the certificate of marriage when offered in evidence. But such allegation does not seem to be necessary to a statement of a cause of action. The name of the officer who performed the ceremony, his official character, the procurement of a license, the return, the witnesses and other circumstances are merely probative facts and not required by the rules of code pleading.<sup>5</sup> The marriage itself is the ultimate fact to be proven. The place where the marriage took place should be alleged as a matter of convenience, and as stating an additional fact to aid the allegation of jurisdiction. In some states the practice and the form of the statutes require that the place of marriage be alleged.<sup>6</sup> The age of the parties should be alleged; but it is not a necessary averment unless required by statute.<sup>7</sup> Where the marriage was without formal solemnization, or was irregular, or did not comply with the statutory requirements, it is the practice in some states to set out the facts

<sup>1</sup> *Collins v. Collins*, 53 Mo. Ap. 470. No allegation of domicile is required in cross-bills. § 744.

<sup>2</sup> For allegation of marriage, see § 751.

<sup>3</sup> *Huston v. Huston*, 63 Me. 184; *Gray v. Gray*, 15 Ala. 779; *Wright v. Wright*, 6 Tex. 3; *Greenlaw v. Greenlaw*, 12 N. H. 200; *Leighton v. Leighton*, 14 Jur. 318; *Pool v.*

*Pool*, 2 *Phillim.* 119; *Brinckle v. Brinckle*, 10 *Phila.* 1.

<sup>4</sup> *Dillon v. Dillon*, 3 *Curt. Ec.* 86.

<sup>5</sup> See *Huston v. Huston*, 63 Me. 184, where petition was held sufficient without an allegation of such facts.

<sup>6</sup> *Greenlaw v. Greenlaw*, 12 N. H. 200; *White v. White*, 5 N. H. 476; *Mix v. Mix*, 1 *Johns. Ch.* 204.

<sup>7</sup> *Lattier v. Lattier*, 5 O. 538

concerning the marriage. A demurrer will then test the validity of such marriage.<sup>1</sup> Where the validity of the marriage is in question in divorce proceedings, this method is to be preferred, as a question of law may thus be disposed of before proceeding to trial.<sup>2</sup>

**§ 733. Plaintiff need not anticipate defenses.**—The petition is sufficient if it set out the jurisdiction of the court and the marriage and the misconduct of defendant amounting to a cause for divorce. It is not necessary to allege the virtues of the plaintiff, since the right to relief is based upon the defendant's misconduct. Such allegation is, however, very frequent in modern practice, but does not add anything to the strength of the pleading. It is not necessary for the petition to show that the adultery which is the cause of action has not been condoned, or was not committed by the procurement or with the connivance of the plaintiff.<sup>3</sup> Nor need the petition contain the negative averment that the plaintiff is not in fault or himself guilty of like conduct.<sup>4</sup> Where the plaintiff seeks divorce for cruelty it is held that the circumstances should be stated so that it will appear that the cruel conduct was not provoked.<sup>5</sup> This is an exception to the general current of authorities, for the provocation is

<sup>1</sup> *Farley v. Farley*, 94 Ala. 501, 10 So. 646; *Andrews v. Andrews*, 75 Tex. 609, 12 S. W. 1124.

<sup>2</sup> In a suit by the wife to have a marriage declared valid the petition may state all the facts which constitute marriage, such as the agreement to marry, a marriage ceremony performed at a certain time and place by a qualified officer, and the subsequent conduct and repute of the parties as husband and wife. In *Gibson v. Gibson*, 24 Neb. 394, 39 N. W. 450, the petition set out in the opinion alleges all the facts constituting the marriage with more minuteness

than is required by the rules of code pleading. The ultimate facts are all that should be alleged. It is not necessary to allege the probative facts.

<sup>3</sup> *Young v. Young*, 18 Minn. 90.

<sup>4</sup> *Steele v. Steele*, 104 N. C. 631, 10 S. E. 707, citing *Edwards v. Edwards*, Phil. (N. C.) 584; *Horne v. Horne*, 72 N. C. 530; *Toms v. Fite*, 93 N. C. 274.

<sup>5</sup> *O'Connor v. O'Connor*, 109 N. C. 139, 13 S. E. 887, citing *White v. White*, 84 N. C. 340; *Joyner v. Joyner*, 6 Jones Eq. 322; *Jackson v. Jackson*, 105 N. C. 433; *McQueen v. McQueen*, 82 N. C. 471.

as much a defense as condonation or recrimination. The statutes of some of the states require the plaintiff to allege his good behavior, that he is not in fault, or that his complaint is not made out of levity or collusion with the defendant, but in sincerity and truth.<sup>1</sup> And where the pleading does not conform to this requirement, the action will be dismissed, although the objection was not raised in the trial court.<sup>2</sup>

**§ 734. Premature suit.**—If the suit was brought before the cause of action was complete it should generally be dismissed, unless the circumstances show something to excuse the premature commencement of the action.<sup>3</sup> In such case the suit should be dismissed without prejudice, as the merits of the case have not been passed upon. And after the cause of action is matured a new suit may be brought. Ordinarily a suit for divorce on the ground of desertion will present some complex question as to the time the desertion commenced, and if the suit is brought in good faith and in honest mistake of the law, the court may, in its discretion, grant the decree where the period of desertion was complete at the time the decree is rendered.<sup>4</sup> To deny a decree in such cases will put the plaintiff to further costs and delay the decree to which he is clearly entitled.

The premature suit need not be dismissed where, by filing an amended petition, the cause will not be premature or incomplete. Thus, where a petition for divorce and alimony was prematurely filed, it was held an amended petition may be filed setting up grounds for alimony occurring after the commencement of the suit, and the court might grant a decree for alimony.<sup>5</sup> Where the period of desertion was not

<sup>1</sup> *Yallaly v. Yallaly*, 39 Mo. 490; *Cameron v. Cameron*, 2 Coldw. (42 Tenn.) 375; *Epling v. Epling*, 1 Bush (Ky.), 74; *Kenemer v. Kenemer*, 26 Ind. 330; *Fritz v. Fritz*, 23 Ind. 388.

<sup>2</sup> *De Armond v. De Armond*, 92 Tenn. 40, 20 S. W. 422.

<sup>3</sup> *Smith v. Smith*, 22 Kan. 699; *Embree v. Embree*, 53 Ill. 394; *Hill v. Hill*, 10 Ala. 527; *Milner v. Milner*, 2 Ed. Ch. 114.

<sup>4</sup> *Hemenway v. Hemenway*, 65 Vt. 623, 27 A. 609.

<sup>5</sup> *Logan v. Logan*, 2 B. Mon. 148.

complete when the suit was commenced, the error may be cured by filing an amended petition after such desertion, is sufficient to constitute a cause for divorce.<sup>1</sup> In a recent case, a petition for divorce was filed before the plaintiff had been a resident of the state for "one year next before the commencement of the action." But after a residence of one year the plaintiff filed an amended petition, adding a new and distinct cause for divorce; and alleged a residence in the state for more than one year next before filing the amended petition. It was held that the filing of the amended petition was equivalent to the commencement of a new suit, and there was no error in granting a decree.<sup>2</sup>

**§ 735. Joinder of causes.**—Different causes for divorce, such as desertion, cruelty and adultery, may be joined in the same petition, although one cause may justify a decree for a dissolution of the marriage, and the other a decree for separation.<sup>3</sup> In such case, where the relief sought is a dissolution of the marriage, the court may grant either decree, according to the proofs. The methods of proof being the same in either case, the different causes may be proved in the same action. A cause for dissolution of marriage and a cause for separation are not inconsistent, since the greater decree includes the less.<sup>4</sup> If a cause for dissolution is shown, such decree may be granted; and if the cause for separation is the only cause proven, a decree for separation may be granted. In those states where the issue of adultery must be tried by a jury, while other causes may be tried upon depositions according to the ordinary course of the court; or where different modes may be adopted for trying two different causes for divorce, only those causes may be joined which are susceptible of the same mode of proof.<sup>5</sup>

<sup>1</sup> McCrocklin *v.* McCrocklin, 2 Wagner, 36 Minn. 239; McDonald B. Mon. 370. <sup>2</sup> Wagner *v.* McDonald, 1 Mich. (N. P.) 191.

<sup>2</sup> Wood *v.* Wood, 59 Ark. 441.

<sup>4</sup> Wagner *v.* Wagner, 36 Minn.

<sup>3</sup> Mack *v.* Handy, 39 La. An. 491, 239.

<sup>2</sup> So. 181; Grant *v.* Grant, 58 Minn. 181, 54 N. W. 1059; Wagner *v.* Namara *v.* McNamara, 9 Abb. Pr.

<sup>5</sup> Zorn *v.* Zorn, 38 Hun, 67; Mc-

**§ 736. Causes for ancillary relief may be joined.**—The divorce suit being a proceeding to dissolve the marriage and permit the parties to separate, it may also be a suit to divide the community property; to adjust the mutual accounts of the parties; to determine who shall own and occupy the homestead, and to determine who is entitled to the custody of the children, and who is to bear the burden of their maintenance and education. When the marriage is dissolved it is the proper time and the right proceeding in which to adjust all the property rights of the parties. The decree of divorce is in effect an adjudication of such matters. But in order to give the court the power to grant such ancillary relief, the pleadings must contain sufficient allegations to raise an issue concerning the relief demanded, otherwise the action of the court will be a mere nullity.<sup>1</sup> As in other suits, the orders and decrees must be justified by the pleadings as well as by the proofs. If an injunction is prayed for, the petition must state sufficient facts to justify an injunction.<sup>2</sup> And if the relief sought is to affect certain real estate, it is necessary to describe the real estate with the same care as in other actions.<sup>3</sup> Generally the wife must give a bond as in the case of an ordinary injunction.<sup>4</sup>

The causes for ancillary relief which may be joined with a cause for divorce must be in some way directly depending upon the right to divorce, and must concern the mutual property rights of both parties. It must be to protect or to adjudicate rights which cannot with safety and propriety

18; *Henry v. Henry*, 17 Abb. Pr. 41; *Hall v. Hall*, 9 Or. 452; *Weber v. Johnson v. Johnson*, 6 Johns. Ch. 163; *Rose v. Rose*, 11 Paige (N. Y.), 166; *Smith v. Smith*, 4 Paige, 92; *McIntosh v. McIntosh*, 12 How. Pr. 289; *Hoffman v. Hoffman*, 35 How. Pr. 384; *Klein v. Klein*, 42 How. Pr. 166; *Snover v. Snover*, 10 N. J. Eq. 261; *Decamp v. Decamp*, 2 N. J. Eq. 294.

<sup>1</sup> *Bamford v. Bamford*, 4 Or. 30;

<sup>2</sup> *Norris v. Norris*, 27 Ala. 519; *Uhl v. Irwin (Okl.)*, 41 P. 376.

<sup>3</sup> *Bamford v. Bamford*, 4 Or. 30. See petition to set aside fraudulent conveyances, § 758.

<sup>4</sup> *In re Pavay*, 52 Kan. 675.

be determined after a divorce has been granted and mutual property rights adjusted. In the proceeding for divorce it is proper to join, either in the same or a supplementary proceeding, an application to enjoin the defendant from interfering with the present custody of children, or the transfer of his property to avoid the payment of alimony.<sup>1</sup>

While the suit is pending the parties have a right to live in separation, and one party may be enjoined from entering the home. Where a husband is guilty of a cause for divorce he may be enjoined from entering a house or a place of business occupied and owned by the wife.<sup>2</sup>

A creditor's bill may be joined with an action for divorce where the object is to set aside a fraudulent conveyance to third parties, and subject the property to the payment of alimony, if granted.<sup>3</sup>

But no action can be joined with the action for divorce when the relief sought has no congruity with divorce and the settlements arising out of a dissolution of the marriage. If the plaintiff can obtain the same relief in an independent action, or if the property in controversy will be secure while the divorce suit is pending, the issues should not be

<sup>1</sup>Busenbark *v.* Busenbark, 33 Kan. 572; Boils *v.* Boils, 41 Tenn. 284; Wharton *v.* Wharton, 57 Ia. 696; Ricketts *v.* Ricketts, 4 Gill (Md.), 105; Johnson *v.* Johnson, 59 Ga. 613; Vanzant *v.* Vanzant, 23 Ill. 536; Errisman *v.* Errisman, 25 Ill. 119, 136; Springfield Ins. Co. *v.* Peck, 102 Ill. 265; Wiley *v.* Wiley, 33 Tex. 358; Tolerton *v.* Willard, 30 O. St. 579; Wilkinson *v.* Elliot, 43 Kan. 590, 23 P. 614; Vermilye *v.* Vermilye, 32 Minn. 499. See *contra*, Newton *v.* Newton, 11 P. D. 11; Wagoner *v.* Wagoner (Md.), 26 A. 284.

<sup>2</sup>Northledge *v.* Northledge, 6 Rep. (1894), 65; Gardner *v.* Gardner, 87 N. Y. 14, reversing 24 Hun, 627.

<sup>3</sup>Twell *v.* Twell, 6 Mont. 19, and cases cited; Vanduzer *v.* Vanduzer, 6 Paige, 366; Livermore *v.* Boutelle, 11 Gray, 217; Chase *v.* Chase, 105 Mass. 387; Barrett *v.* Barrett, 5 Or. 413; Bailey *v.* Bailey, 61 Me. 363; Bouslaugh *v.* Bouslaugh, 68 Pa. St. 495; Turner *v.* Turner, 44 Ala. 437; Morrison *v.* Morrison, 49 N. H. 69; Kamp *v.* Kamp, 46 How. Pr. 143; Draper *v.* Draper, 68 Ill. 17; Nix *v.* Nix, 10 Heisk. 546; Dugan *v.* Trisler, 69 Ind. 553; Way *v.* Way, 67 Wis. 662; Damon *v.* Damon, 28 Wis. 510; Gibson *v.* Gibson, 46 Wis. 449; Boog *v.* Boog, 78 Ia. 524; Atkins *v.* Atkins, 18 Neb. 474.

tried in a divorce suit but in a separate action, where a single issue may be tried by the proper parties. Thus, an action to quiet title cannot be joined with an action to annul the marriage.<sup>1</sup> An action to recover personal property and to settle an estate;<sup>2</sup> or to adjust accounts with a mortgagee who is in possession of the community property;<sup>3</sup> or to enforce a deed;<sup>4</sup> or to set aside a deed to the wife's land,<sup>5</sup> should not be joined with a suit for divorce, as in any of these cases the same relief could be obtained in a separate action. In one case, where a divorce was refused and the wife had some property in her own right, while the husband had none, and no alimony was awarded, the court did not consider the proceeding a proper one for an accounting between the husband and wife for the wife's separate property. "The property claimed by the complainant does not relate to or grow out of the marital relation. It was her separate estate, subject to her entire control independent of her husband. Its recovery had no congruity whatever with her action for divorce, and should have been sought in an independent action."<sup>6</sup> But in case a decree had been granted and the property divided, it is clear that such accounting would have been necessary to a complete adjustment of their rights. The divorce suit must be determined, of course, before the trial of the issues concerning the ancillary relief.

**§ 737. The prayer.**—The usual practice is to pray for the specific relief desired, and also for such general relief as may seem just and equitable.<sup>7</sup> Under this form of prayer the plaintiff may have any decree which is sustained by the pleadings and proof,<sup>8</sup> or which is "consistent with the case made by the complaint and embraced within the issue."<sup>9</sup> It is held that under the general prayer a plaintiff is entitled

<sup>1</sup> *Uhl v. Uhl*, 52 Cal. 250.

<sup>6</sup> *Peck v. Peck*, id.

<sup>2</sup> *Faulk v. Faulk*, 23 Tex. 653.

<sup>7</sup> See petitions for divorce, § 731.

<sup>3</sup> *Cummings v. Cummings*, 75 Cal. 434, 14 P. 562.

<sup>8</sup> *Pillow v. Pillow*, 13 Tenn. 420.

<sup>4</sup> *Fritz v. Fritz*, 23 Ind. 388.

<sup>9</sup> *Cummings v. Cummings*, 75 Cal.

<sup>5</sup> *Peck v. Peck*, 66 Mich. 586, 33 N. W. 893.

434, 14 P. 562.

to a decree for alimony, for such relief is incidental to a decree for divorce.<sup>1</sup> But the best practice is to set out the facts which entitle the party to alimony and ask for such specific relief. And if any ancillary relief is sought, such as the custody of children, a writ *ne exeat*, or an injunction to restrain the defendant from interfering with the plaintiff or disposing of his property, the petition must contain the necessary allegation and a specific prayer for such relief.<sup>2</sup> A judgment by default must be vacated if the ancillary relief granted is greater than that asked for in the petition.<sup>3</sup> If the prayer is specific that relief will be granted. But if the proofs do not justify the relief prayed for, no other will be granted.<sup>4</sup> It is held error to decree a divorce *a vinculo* under a prayer for alimony and general relief.<sup>5</sup> Directly opposed to these rulings is the better doctrine that the court will grant the relief that is justified by the pleading and proof. Thus a decree of divorce may be granted although the prayer is for a decree of nullity.<sup>6</sup>

In those states where a cause for separation may be joined with a cause for dissolution of the marriage, the prayer may be in the alternative form. This is not a violation of the rule of pleading that the kinds of relief sought must be consistent.<sup>7</sup> Although the absolute divorce and the limited divorce are provided for by separate and distinct sections of a statute, yet the proceedings which lead to the decree are the same in both cases. The two forms of relief are not inconsistent, for the absolute divorce may be said to include the limited divorce as the whole includes the part. The relief in either case is a change of the marital relation, and

<sup>1</sup> Darrow *v.* Darrow, 43 Ia. 411.

<sup>3</sup> Hoh *v.* Hoh, 84 Wis. 378, 54 N.

<sup>2</sup> Handlin *v.* Handlin, 37 W. Va.

W. 731.

486, 16 S. E. 597; Feigley *v.* Feigley, 7 Md. 537; Gibson *v.* Gibson, 46

Wis. 449; Wilson *v.* Wilson, Wright 420,  
(O.), 129; Bayly *v.* Bayly, 2 Md. Ch.

326; Edmonds *v.* Her Husband, 4 La. An. 489.

<sup>4</sup> Walton *v.* Walton, 32 Barb. 203,  
20 How. Pr. 347.  
<sup>5</sup> Pillow *v.* Pillow, 13 Tenn. 420.  
<sup>6</sup> Caton *v.* Caton, 6 Mackey, 310.  
See, also, Tefft *v.* Tefft, 35 Ind. 44;  
Powell *v.* Powell, 18 Kan. 371.

<sup>7</sup> Bliss, Code Pleading, § 164.

the difference in the decrees is one of degree and not of kind.<sup>1</sup> For like reasons a bill for divorce may be converted into a bill for separate maintenance.<sup>2</sup> The general practice is believed to be in accord with this doctrine. The two kinds of relief are asked in the same proceeding, and, the prayer being in the alternative, the court grants the one or the other according to the proof.<sup>3</sup> The court having jurisdiction of the parties and the subject-matter should retain the cause and grant complete relief.<sup>4</sup> Under the practice in the code states the prayer may always be amended to conform to the pleadings and proof if both parties are before the court and the cause of action is not changed. A prayer for divorce cannot be amended to a prayer for annulment of the marriage, although the pleading and evidence would support a decree of nullity.<sup>5</sup> But where the allegations of the petition are sufficient, a prayer for alimony may be amended to a prayer for absolute divorce.<sup>6</sup>

**§ 738. Verification.**—A verification to a petition for divorce is not absolutely necessary, even where the plaintiff may require the defendant to answer under oath.<sup>7</sup> But in most of the states a verification is required by statute or by a rule of court which is authorized by statute.<sup>8</sup> The verification is sufficient if it complies with the provision of the code relating to verification of pleadings.<sup>9</sup> Where the pleading is not verified as required, the proper practice is to move

<sup>1</sup> *Grant v. Grant*, 53 Minn. 181, 54 N. W. 1059; *Wagner v. Wagner*, 36 Minn. 239, 30 N. W. 766; *Fera v. Fera*, 98 Mass. 155.

<sup>2</sup> *Klemme v. Klemme*, 37 Ill. Ap. 54.

<sup>3</sup> *Young v. Young*, 4 Mass. 430.

<sup>4</sup> *Bliss*, Code Pleading, § 166.

<sup>5</sup> *Schaftberg v. Schaftberg*, 52 Mich. 429.

<sup>6</sup> *Williams v. Williams* (Ky.), 29 S. W. 132.

<sup>7</sup> *Musselman v. Musselman*, 44 Ind. 106.

<sup>8</sup> See *Anable v. Anable*, 24 How. Pr. 92; *Farace v. Farace*, 61 How. Pr. 61; *Reeves v. Reeves*, 34 Leg. Int. 115; *Garrett v. Garrett*, 4 W. N. C. 240; *Ex parte Bruce*, 6 P. D. 16; *Grisson v. Grisson*, 8 W. N. C.

484; *Dyer v. Dyer*, 5 N. H. 271.

<sup>9</sup> *Burdick v. Burdick*, 7 Wash.

535, 35 P. 415. For form of verification required in Michigan, see *P. v. McCaffrey*, 75 Mich. 115, 42 N. W. 681.

to have the action dismissed,<sup>1</sup> and then the court may permit an amendment or enter a dismissal. Should the court attempt to proceed without a verified petition against the defendant's objection, *mandamus* will lie to compel the court to dismiss the action.<sup>2</sup> The verification being a statutory requirement, it is held that the defendant cannot waive the defect,<sup>3</sup> and the action will be dismissed by the appellate court although this objection had not been raised in the trial court.<sup>4</sup> But it would seem that the statute is merely directory, and after decree a defective verification is a mere irregularity, not a cause for reversal, unless the objection is raised in the lower court.<sup>5</sup> It seems that a decree based upon a petition not verified is valid, and will not be set aside for such defect, as the verification is not a jurisdictional requisite.<sup>6</sup> The verification may be amended or added after decree.<sup>7</sup>

**§ 739. Bill of particulars.**—According to an ancient practice, a defect in a pleading might be cured by subsequently filing a bill of particulars, giving the definite facts which should have been stated in the original pleading.<sup>8</sup> In some states this practice continues, and it is permissible to omit the usual allegations of time and place until the court orders a bill of particulars.<sup>9</sup> Such practice continues in the English divorce court, but the bill of particulars will not

<sup>1</sup> *Warner v. Warner*, 11 Kan. 121.

<sup>8</sup> See, also, Bill of particulars in aid of allegations of adultery, § 182.

<sup>2</sup> *Ayers v. Gartner*, 90 Mich. 380, 51 N. W. 461.

<sup>9</sup> *Realf v. Realf*, 77 Pa. 31; *Hancock's Appeal*, 64 Pa. 470; *Brinckle v. Brinckle*, 10 Phila. 144; *Edwards v. Edwards*, 9 Phila. 617; *Butler v. Butler*, 1 Parson, 329; *Weimer v. Weimer*, 1 Parson, 539; *Harrington v. Harrington*, 107 Mass. 329;

<sup>3</sup> *Id.*

<sup>4</sup> *De Armond v. De Armond*, 92 Tenn. 41, 20 S. W. 422.

<sup>5</sup> *Holcomb v. Holcomb*, 100 Mich. 421, 59 N. W. 170.

<sup>6</sup> *McCreaney v. McCreaney*, 5 Ia. 252; *Darrow v. Darrow*, 43 Ia. 411.

<sup>7</sup> *Daly v. Hosmer* (Mich.), 60 N. W. 758.

A verification before an officer not mentioned in the statute is sufficient, as such statute is

merely directory. *Brown v. Brown* (Ind.), 37 N. E. 142.

merely directory. *Brown v. Brown* (Ind.), 37 N. E. 142.

supply the defects of a mere general allegation.<sup>1</sup> The power to permit or require the filing of a bill of particulars is discretionary with the court, as is usually the case with orders concerning the issues preliminary to the trial.<sup>2</sup> Under the rules of code pleading a vague and indefinite pleading should be attacked by a motion to make the pleading more definite and certain, and such is the practice in most of the code states.<sup>3</sup> In New York, however, the practice of filing a bill of particulars still continues.<sup>4</sup>

**§ 740. Supplemental pleadings.**—Causes for divorce arising after filing the pleading cannot be proved as a cause for divorce unless a supplemental pleading has been filed containing the necessary allegations.<sup>5</sup> In such cases the subsequent facts constituting a cause for divorce must be set out in a supplemental pleading or may be incorporated by amendment into the original pleadings.<sup>6</sup> According to the practice

<sup>1</sup> *Leete v. Leete*, 2 Swab. & T. 568; *Brook v. Brook*, 12 P. D. 19; *Codrington v. Codrington*, 4 Swab. & T. 63; *Hunt v. Hunt*, 2 Swab. & T. 574; *Porter v. Porter*, 3 Swab. & T. 596.

<sup>2</sup> *Harrington v. Harrington*, 107 Mass. 329.

<sup>3</sup> *Freeman v. Freeman*, 39 Minn. 370, 40 N. W. 167.

<sup>4</sup> § 182; *Carrillo v. Carrillo*, 6 N. Y. Supp. 305; *Carpenter v. Carpenter*, 17 N. Y. Supp. 195; *Mitchell v. Mitchell*, 61 N. Y. 398; *Codd v. Codd*, 2 Johns. Ch. 234.

An answer alleged the plaintiff's adultery in the following terms: "That during the year 1894, prior to the 19th day of December, 1894, the plaintiff, without the connivance, consent, privity or procurement of this defendant, had sexual intercourse with some man or men, whose name or names are at the present time unknown to this de-

fendant, but that such sexual intercourse took place in New York." A motion to make this allegation more definite and certain by stating the places and dates when and where such sexual intercourse took place was overruled because the court could determine with ordinary certainty the meaning of the allegation and the defense intended. A bill of particulars should have been applied for. *Kelly v. Kelly*, 12 Misc. 457.

<sup>5</sup> *Marsh v. Marsh*, 13 N. J. Eq. 281; *Ferrier v. Ferrier*, 4 Edw. Ch. 296; *Burdell v. Burdell*, 2 Barb. 473; *Feigley v. Feigley*, 7 Md. 537; *Klemme v. Klemme*, 37 Ill. Ap. 54; *Blanc v. Blanc*, 67 Hun, 384, 22 N. Y. Supp. 264. But see, *contra*, *Halstead v. Halstead*, 26 N. Y. Supp. 758, 5 Misc. Rep. 416.

<sup>6</sup> *Steele v. Steele*, 35 Conn. 48; *Cornwall v. Cornwall*, 30 Hun, 573; *Butler v. Butler*, 4 Litt. (Ky.) 201;

in some states a new subpoena must be served after filing the supplemental bill.<sup>1</sup> The plaintiff may file a supplementary petition asking for ancillary relief, such as injunction or a creditor's bill.<sup>2</sup> Since the interest of the state demands that no defense to the proceeding should be suppressed, the courts always allow a supplemental answer to be filed, showing any defense which may have arisen since the original answer was filed.<sup>3</sup> A party is not compelled to file a supplemental petition, but may bring another action based upon a cause for divorce which did not exist when the former proceeding was commenced.<sup>4</sup> The granting or refusing the privilege of filing a supplemental pleading is within the discretionary power of the court, and it may determine at how late a stage of the action the supplemental pleading may be filed.<sup>5</sup> If defendant pleads condonation, the plaintiff will be granted leave to file a supplemental petition charging an act of adultery committed after the commencement of the action.<sup>6</sup>

**§ 741. Amendments.**—The divorce suit is analogous to a proceeding in equity, and amendments are permitted as in such proceedings and not according to the practice at common law.<sup>7</sup> The allowance of amendments is generally within the discretion of the judge who presides at the trial.<sup>8</sup> The general concurrence of authorities is that amendments may be allowed in divorce suits as in other cases.<sup>9</sup>

*Logan v. Logan*, 2 B. Mon. 142; *McCrocklin v. McCrocklin*, 2 B. Mon. 370. See, *contra*, *Halstead v. Halstead*, 7 Misc. 23; *Neiberg v. Neiberg*, 8 Misc. 97.

<sup>1</sup> *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405.

<sup>2</sup> *Peck v. Peck*, 66 Mich. 586, 33 N. W. 893.

<sup>3</sup> *Fuller v. Fuller*, 41 N. J. Eq. 189; *Strong v. Strong*, 3 Rob. (N. Y.) 669; *Stilphen v. Stilphen*, 58 Me. 508; *Armstrong v. Armstrong*, 27 Ind. 186; *Wilson v. Wilson*, 40 La. 230.

<sup>4</sup> *Cordier v. Cordier*, 26 How. Pr. 187.

<sup>5</sup> *Scoland v. Scoland*, 4 Wash. 118, 29 P. 930.

<sup>6</sup> *Lutz v. Lutz* (N. J. Eq.), 20 A. 315.

<sup>7</sup> *Clayburgh v. Clayburgh*, 15 Weekly Notes (Pa.), 363.

<sup>8</sup> *Harrington v. Harrington*, 107 Mass. 329; *Ford v. Ford*, 104 Mass. 198; *Musselman v. Musselman*, 44 Ind. 106.

<sup>9</sup> *Briggs v. Briggs*, 20 Mich. 34; *Green v. Green*, 26 Mich. 437; *Shaf-*

The prayer of the petition may be changed from a prayer for a dissolution of the marriage to one for a decree of separation, but not otherwise.<sup>1</sup> The discretionary power to permit amendment is so great that it seems to be without limitation, except that the amendment shall not bring in a new cause of action, either in an action at law or suit in equity or in proceedings under the code.<sup>2</sup> A prayer for alimony may be amended to a prayer for absolute divorce.<sup>3</sup>

As in other actions the pleadings in divorce suits may be amended before the trial,<sup>4</sup> at the final hearing,<sup>5</sup> or during the trial,<sup>6</sup> or after the submission of the evidence to the court.<sup>7</sup> The court may permit the plaintiff to strike allegations of different acts of adultery from his petition against the defendant's objection.<sup>8</sup> The pleading may be amended to conform to the evidence which has been admitted with-

*berg v. Shafberg*, 52 Mich. 429; 487; *Wright v. Wright*, 1 Swab. & Crawford v. Crawford, 17 Fla. 180; T. 80; *Ashley v. Ashley*, 3 Swab. Armstrong v. Armstrong, 27 Ind. 186; *Errisman v. Errisman*, 25 Ill. 136; *Fishli v. Fishli*, 2 Litt. (Ky.) 337; *Anderson v. Anderson*, 4 Me. 100; *Inskeep v. Inskeep*, 5 Ia. 204; *Tourtelot v. Tourtelot*, 4 Mass. 506; *Whip v. Whip*, 54 N. H. 580; *Miller v. Miller*, 40 N. J. Eq. 475; *Brinkley v. Brinkley*, 56 N. Y. 192; *Rose v. Rose*, 11 Paige (N. Y.), 166, 192; *Crocker v. Crocker*, Shelden, 274; *Mix v. Mix*, 1 Johns. Ch. (N. Y.) 204; *Robertson v. Robertson*, 9 Daly, 44; *Klein v. Klein*, 9 Daly, 44; *Grove's Appeal*, 37 Pa. 443; *Power's Appeal*, 120 Pa. 320; *Hancock v. Hancock*, 13 W. N. C. 29; *Mathews v. Mathews*, 6 W. N. C. 147; *Perkins v. Perkins*, 16 W. N. C. 29; *Shay v. Shay*, 9 Phila. 521; *Spilsbury v. Spilsbury*, 3 Swab. & T. 210; *Lapington v. Lapington*, 14 P. D. 21; *Rowley v. Rowley*, 1 Swab. & T.

<sup>1</sup> *Hackney v. Hackney*, 28 Tenn. 450; *Anderson v. Anderson*, 4 Me. 100. See *Drysdale v. Drysdale*, 1 P. & M. 365; *Mycock v. Mycock*, 2 P. & M. 98.

<sup>2</sup> *Bliss on Code Pleading*, sec. 429.

<sup>3</sup> *Williams v. Williams* (Ky.), 29 S. W. 132.

<sup>4</sup> *Freeman v. Freeman*, 39 Minn. 370, 40 N. W. 167; *Richards v. Richards*, Wright, 302; *Bird v. Bird*, Wright, 98; *Briggs v. Briggs*, 20 Mich. 34.

<sup>5</sup> *Barrett v. Barrett*, 37 N. J. Eq. 29.

<sup>6</sup> *Melvin v. Melvin*, 130 Pa. 6, 18 A. 920; *Lee v. Lee*, 3 Wash. 236, 28 P. 355. See *Carter v. Carter*, 152 Ill. 434, 28 N. E. 948.

<sup>7</sup> *Miller v. Miller*, 40 N. J. Eq. 475.

<sup>8</sup> *Peacock v. Peacock*, 6 Rep. (1894), 61.

out objection,<sup>1</sup> but not where such evidence disclosed a state of facts entirely different from those alleged in the petition.<sup>2</sup> Where a cause was reversed by the supreme court, leave may be granted to amend the petition.<sup>3</sup>

**§ 742. Demurrer.**—The sufficiency of a petition or cross-petition for divorce may be tested by demurrer as in other cases.<sup>4</sup> In such case the demurrer is not such an admission of the facts as to justify a decree upon the pleading should the demurrer be overruled. A demurrer is not in fact an admission of the truth of the facts pleaded, but is a pleading that creates an issue of law whether the facts alleged are sufficient to constitute a cause of action. It is a denial of the proposition of law contained in the petition.<sup>5</sup> The cause for divorce must be proven, and cannot be granted upon a demurrer any more than upon the admissions and declarations of the parties.<sup>6</sup> The demurrer should be overruled if all the facts essential to the relief prayed for have been stated or may be reasonably inferred from the facts alleged.<sup>7</sup> As in other cases, if the pleading is vague and indefinite the defect should be brought to the attention of the court by a motion for a more specific statement and not by demurrer.<sup>8</sup> The demurrer must be overruled if the pleading is sufficient to entitle the party to some relief, although not sufficient to justify the relief demanded.<sup>9</sup> But

<sup>1</sup> Adams *v.* Adams, 20 N. H. 299; gerth, 15 Or. 626, 16 P. 650; Stone O'Connor *v.* O'Connor, 109 N. C.

v. Stone, 13 A. 245.

139, 18 S. E. 887; Jackson *v.* Jackson, 105 N. C. 433, 11 S. E. 448.

<sup>6</sup>Rie *v.* Rie, 34 Ark. 37.

<sup>2</sup> Green *v.* Green, 26 Mich. 437.

<sup>7</sup>Huston *v.* Huston, 63 Me. 184;

<sup>3</sup>Jones *v.* Jones, 62 N. H. 463. See, also, Harrison *v.* Harrison, 94 Mich. 599, 54 N. W. 275; Power's Appeal, 120 Pa. 320.

<sup>8</sup>Murphy *v.* Murphy, 95 Ind. 430; Steele *v.* Steele, 104 N. C. 631, 10 S. E. 707; Van Benthuysen *v.* Van Benthuysen, 2 N. Y. Supp. 238; Holyoke *v.* Holyoke, 78 Me. 404.

<sup>4</sup>See Mix *v.* Mix, 1 Johns. Ch. 204; Vance *v.* Vance, 17 Me. 203.

<sup>9</sup>Goodwin *v.* Goodwin, 23 N. J. Eq. 210; Marsh *v.* Marsh, 16 N. J. Eq. 391; Black *v.* Black, 26 N. J. Eq. 431; Brown *v.* Brown (Ind.), 37 N. E. 142.

<sup>5</sup>Rice *v.* Rice, 13 Or. 337, 10 P. 495, citing Bliss on Code Pleading, sec. 418. See, also, Eggerth *v.* Eg-

<sup>9</sup>Hooper *v.* Hooper, 19 Mo. 355.

if the facts alleged do not constitute a cause for divorce the pleading may be amended or the action dismissed.<sup>1</sup>

**§ 743. The answer.**—The answer must conform to the practice in the particular jurisdiction. Generally the divorce suit is a suit in equity, and the answer must conform to the requirements of an answer in equity.<sup>2</sup> In the code states the answer must conform to the requirements of code pleading, and must allege issuable facts essential to the defense, and not relate the evidence by which such facts will be established.<sup>3</sup> If the answer follows the old chancery practice, and alleges mere matters of evidence and probative facts, such allegations may be stricken out as redundant and irrelevant.<sup>4</sup> The answer may traverse the allegations of the petition or may consist of a general denial. Under the code, “a statement of facts by way of defense, which are merely inconsistent with those stated by the plaintiff, is, in effect, a denial.”<sup>5</sup> The general denial puts in issue all the material averments of the complaint, and permits the defendant to prove any facts which negative those averments;<sup>6</sup> but it will not permit defendant to establish the usual defenses, such as collusion or connivance. While it is true that the court will permit any evidence showing connivance, and will of its own motion direct further inquiry concerning defenses not pleaded, the safest and best practice is to set up the defense in the answer, otherwise the cause will be continued to allow the plaintiff an opportunity to meet the issue raised at the trial. Where there is an issue of this kind raised on trial, and the plaintiff is taken by surprise, the court should direct an amended answer to be filed, and continue the case if the plaintiff so request. A general denial puts in issue the mar-

<sup>1</sup> *Martin v. Martin*, 33 W. Va. 695, 11 S. E. 12; *Fairchild v. Fairchild*, 43 N. J. Eq. 473, 11 A. 426; *Hopper v. Hopper*, 11 Paige, 46. See form of answer in *Warner v. Warner*, 54 Mich. 492; *Paden v. Paden*, 28 Neb. 275.

<sup>2</sup> For forms of answers in suits for divorce see § 753.

<sup>3</sup> *Vermilye v. Vermilye*, 32 Minn. 499.

<sup>4</sup> Bliss, Code Pleading, cited in *Sylvis v. Sylvis*, 11 Colo. 319, 17 P. 912.

<sup>5</sup> *Id.*

riage of the parties. But if the defendant desires to prove a prior marriage as a defense, he must plead such new matter in avoidance to make such defense available.<sup>1</sup> The answer may join all consistent defenses. The defendant may deny the allegations of the bill and plead condonation,<sup>2</sup> or he may join a plea of connivance with a general denial of the alleged offense.<sup>3</sup> The general denial may be joined with any special matter of defense. The answer may be amended as in other cases.<sup>4</sup> And it need not be under oath unless required by statute or the rules of the court.<sup>5</sup> The admissions in the answer, whether under oath or not, do not relieve the plaintiff from the necessity of establishing his case with full and satisfactory evidence.<sup>6</sup>

**§ 744. Cross-bill for affirmative relief.**—Under the ecclesiastical practice the defendant could allege and prove a cause for divorce as a defense in recrimination, and if the plaintiff failed in his proofs the defendant could have affirmative relief upon establishing the plaintiff's misconduct.<sup>7</sup> It seems that the defendant might obtain any relief which concerned the marriage relation, such as divorce, annulment of the marriage or restitution of conjugal rights. In a suit for restitution of conjugal rights the defendant may have a decree of divorce.<sup>8</sup> Or in a suit for annulment of the mar-

<sup>1</sup> *Vincent v. Vincent*, 17 N. Y. Supp. 497, 16 Daly, 584.

411, the plaintiff prayed for divorce on the ground of cruelty, and the defendant set up the adultery of

<sup>2</sup> *Wood v. Wood*, 2 Paige, 108.

the plaintiff. No relief was granted either party, but the court held

<sup>3</sup> *Austin v. Austin*, 10 Conn. 221; *Rogers v. Rogers*, 3 Hagg. Ec. 57.

that the defendant might have affirmative relief in the same action, not only upon a cross-demand,

<sup>4</sup> *Sharon v. Sharon*, 77 Cal. 102, 19 P. 230; *Magill's Ap.*, 59 Pa. 430; *Strong v. Strong*, 28 How. Pr. 432.

but even upon his answer if his evidence showed him entitled to

<sup>5</sup> *Sweet v. Sweet*, 15 How. Pr. 169; *Anable v. Anable*, 24 How. Pr. 92. But see *Olney v. Olney*, 7 Abb. Pr. 350.

it. Citing *Dynely v. Dynely* (1732), and *Mathews v. Mathews* (1769).

<sup>6</sup> *Hughes v. Hughes*, 44 Ala. 698, 702; *Schmidt v. Schmidt*, 29 N. J. Eq. 496.

<sup>8</sup> *Dysart v. Dysart*, 1 Rob. Ec. 106; *Anichini v. Anichini*, 2 Curt. Ec. 210.

<sup>7</sup> *In Best v. Best*, 1 Addams Ecc.

riage the court may grant the defendant a decree for restitution of conjugal rights.<sup>1</sup> Adultery or cruelty could be shown as a justification for the separation, and therefore a defense to the suit for the restitution of conjugal rights. If the defendant could establish this defense, the suit for restitution was dismissed and the defendant became entitled to a decree of divorce as though he was the original plaintiff in a separate suit for this purpose.<sup>2</sup> This practice continued until the divorce act provided that, "in any suit for the dissolution of the marriage, . . . the court . . . may give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief."<sup>3</sup>

The ecclesiastical practice is a part of the common law and may be followed in our country where our practice is inadequate, unless the statute has abrogated such practice by prescribing a different method of obtaining relief. The power to grant affirmative relief is assumed by some of the courts, or at least exercised without question.<sup>4</sup> If the statute contains no provision upon the subject, and the usual provision concerning counter-claims and set-off is inapplicable to suits for divorce, it is held that affirmative relief will be granted according to the ecclesiastical practice.<sup>5</sup>

In most of the states the proceeding for divorce is in many respects a suit in equity, and conforms to the practice in equity cases where relief may be granted on a cross-bill or cross-petition.<sup>6</sup> It is convenient and practical to adjust

<sup>1</sup> *Clowes v. Jones*, 3 Curt. Ec. 185.

<sup>2</sup> *Poynter*, Mar. & Div. 241.

<sup>3</sup> *Blackborne v. Blackborne*, 1 P. & D. 563; *Brown v. Brown*, 3 P. & M. 202; *D. v. D.*, 10 P. D. 75; *Moore*

*v. Moore*, 12 P. D. 193; *Drysdale v. Drydale*, 1 P. & D. 365. See, also, *Bancroft v. Bancroft*, 3 Swab. & T. 597; *Osborne v. Osborne*, 3 Swab. & T. 327.

<sup>4</sup> *Shafer v. Shafer*, 10 Neb. 468;

*Coulthurst v. Coulthurst*, 58 Cal.

239; *Bovo v. Bovo*, 63 Cal. 77; *Lee v. Lee*, 1 Duv. (Ky.) 196; *Hoff v. Hoff*, 48 Mich. 281; *Martin v. Martin*, 33 W. Va. 695.

<sup>5</sup> *Wuest v. Wuest*, 17 Nev. 217, 30 P. 886. See, also, § 745.

<sup>6</sup> *Osborn v. Osborn*, 44 N. J. Eq. 257; *Sterl v. Sterl*, 2 Ill. Ap. 223; *Harrison v. Harrison*, 46 N. J. Eq.

75.

all the marital rights of the parties in one proceeding and thus avoid a multiplicity of suits. No useful purpose could be subserved by compelling the defendant to prosecute a separate proceeding for divorce or annulment of marriage when the issue in the first proceeding will involve the validity of the marriage and the causes for divorce set up in recrimination, and must be proved by substantially the same evidence. The cross-bill should be a complete bill, and should state the cause of action with the same particularity and conform to the statutory requirements as if it were an original bill.<sup>1</sup> It need not be verified as an original bill unless the statute so requires.<sup>2</sup> Nor need it contain the allegations showing the jurisdiction of the court and the domicile of the parties.<sup>3</sup> For the jurisdiction of the court depends upon the plaintiff's bill and his right to proceed. A non-resident defendant who appears and seeks affirmative relief is not to be dismissed without a remedy because he has not the statutory residence required in an original bill.<sup>4</sup>

The defendant may seek any kind of relief which will affect the marital relation, regardless of the kind of relief asked for by the plaintiff.<sup>5</sup> Thus in an action for separation the defendant may obtain a decree of dissolution.<sup>6</sup> Or, in an action for absolute divorce, the defendant may set up a cause for separation,<sup>7</sup> or a cause for dissolution,<sup>8</sup> or both.<sup>9</sup> The wife may set up the necessary facts and obtain alimony and the custody of the children without obtaining a divorce.<sup>10</sup>

<sup>1</sup> *Moores v. Moores*, 16 N. J. Eq. 275; *Burr v. Burr*, 2 Edw. Ch. (N. Y.) 448; *Clark v. Clark*, 5 Hun, 340; *Chestnut v. Chestnut*, 88 Ill. 548.

<sup>2</sup> *Musselman v. Musselman*, 44 Ind. 106.

<sup>3</sup> *Lesseuer v. Lesseuer*, 31 Barb. (N. Y.) 330. But see *Coulthurst v. Coulthurst*, 58 Cal. 238.

<sup>4</sup> §§ 47 and 48, citing *Sterl v. Sterl*, 2 Ill. Ap. 223; *Jenness v. Jenness*, 24 Ind. 355.

<sup>5</sup> For form of cross-bill see § 754.

<sup>6</sup> *Van Benthuysen v. Van Benthuysen*, 17 N. Y. St. Rep. 978; *De Pass v. Winter*, 23 La. An. 422.

<sup>7</sup> *Spahn v. Spahn*, 12 Abb. N. C. 169.

<sup>8</sup> *Mott v. Mott*, 82 Cal. 413, 22 P. 1140.

<sup>9</sup> *Spahn v. Spahn*, 12 Abb. N. C. 169.

<sup>10</sup> *Gilpin v. Gilpin*, 12 Colo. 504, 21 P. 612; *Allen v. Allen*, 1 Hemp. (Ark.) 58.

In an action for divorce the defendant may deny that there is a valid marriage subsisting between the parties, and may ask to have the marriage annulled.<sup>1</sup> Or, in an action to annul the marriage, the defendant may allege the validity of the marriage and ask for divorce,<sup>2</sup> or for alimony without divorce.<sup>3</sup> In every suit for divorce the marriage must first be proved, since if there is no marriage there has been no marital wrong to redress and no relation to dissolve. The validity of the marriage is thus brought in question, and if the court determines that there is no marriage the defendant is entitled to a decree declaring the marriage void. No good reason appears why this decree cannot be entered in such a proceeding. The parties are before the court having jurisdiction of the controversy, and the pleadings and evidence are a sufficient foundation for the decree, and the suit is the proper time and place to raise such an issue. Otherwise the decree of divorce will have no validity; for in another proceeding it may be shown that in fact no marriage ever existed, and therefore the decree dissolving such marriage is void. The cross-bill should be answered and the allegations of the bill denied.<sup>4</sup> But a failure to deny the allegations will not entitle the defendant to a decree without proof.<sup>5</sup> The cross-bill may set up facts which occurred after the commencement of the action.<sup>6</sup>

Ordinarily the cross-bill should be filed with the answer, but it may be filed afterwards with leave of court.<sup>7</sup> Under the peculiar facts of one case it was held no error for the

<sup>1</sup>See *D. v. D.*, 10 P. D. 75; *Freeman v. Freeman* (Ky.), 13 S. W. 246; *Wheeler v. Wheeler*, 76 Wis. 631, 45 N. W. 531; *Winans v. Winans*, 124 N. Y. 140, 26 N. E. 293.

<sup>2</sup> *Wadsworth v. Wadsworth*, 81 Cal. 182, 22 P. 648.

<sup>3</sup> *Poole v. Wilbur*, 95 Cal. 339.

<sup>4</sup> *Leslie v. Leslie*, 11 Abb. N. C. 311; *Armstrong v. Armstrong*, 27 Ind. 186; *Ficke v. Ficke*, 62 Mo. 335.

<sup>5</sup> *Freeman v. Freeman*, 13 S. W. 246; *Sylvis v. Sylvis*, 11 Colo. 319, 7 P. 912; *Nichols v. Nichols*, 39 Mo. Ap. 291.

<sup>6</sup> *Martin v. Martin*, 38 W. Va. 695, 11 S. E. 12; *Wilson v. Wilson*, 40 Ia. 230; *Armstrong v. Armstrong*, 27 Ind. 186.

<sup>7</sup> *Johnson v. Johnson*, 50 Mich. 293.

court to permit defendant to file an amended cross-bill setting up affirmative matter, and asking for a divorce after the greater portion of plaintiff's evidence was taken, where an application for leave to file a cross-bill was made before the commencement of the trial.<sup>1</sup>

If the allegations of both the bill and cross-bill are proved no decree of divorce can be entered; both parties cannot be entitled to a divorce. The defendant has established recrimination as a defense.<sup>2</sup> Where a cross-bill has been filed the decree should contain findings as to both the bill and the cross-bill and should state upon which pleading the decree is based.<sup>3</sup> The want of such finding will not, however, cause a reversal of the decree if the evidence is insufficient to sustain a finding in favor of the party raising the objection.<sup>4</sup>

**§ 745. Statutes permitting cross-bills.**—Sometimes the statutes provide that the defendant may have affirmative relief in an action for divorce.<sup>5</sup> Thus, in Indiana it is provided that, "in addition to an answer, the defendant may file a cross-petition for divorce; and when filed, the court shall decree a divorce to the party legally entitled thereto." This authorizes the court to determine from all the evidence introduced by both parties which one is entitled to a divorce and to render a decree accordingly.<sup>6</sup> It is doubtful whether affirmative relief can be granted in an action for divorce under the usual provisions of the codes of civil procedure regulating counter-claims. The marital wrong which is set

<sup>1</sup> *Van Voorhis v. Van Voorhis*, 94 Mich. 60, 53 N. W. 964.

<sup>2</sup> *Gullett v. Gullett*, 25 Ind. 517; *Reddington v. Reddington*, 2 Colo. Ap. 8, and cases cited. See, also, *Recrimination*, §§ 425-443.

<sup>3</sup> *Haley v. Haley*, 44 Ark. 429; *Cassidy v. Cassidy*, 63 Cal. 352; *Gullett v. Gullett*, 25 Ind. 517; *Pollock v. Pollock*. 71 N. Y. 187.

<sup>4</sup> *White v. White*, 82 Cal. 427.

<sup>5</sup> Rev. Stat. Ill.; *Owen v. Owen*, 54 Ga. 527; *Jenness v. Jenness*, 24 Ind. 355; *Hoffman v. Hoffman*, 43 Mo. 547; *Ficke v. Ficke*, 62 Mo. 337; *Carter v. Carter*, 62 Ill. 439; *Chestnut v. Chestnut*, 88 Ill. 548; *Armstrong v. Armstrong*, 27 Ind. 186; Rev. Code Iowa (1888), § 3416.

<sup>6</sup> *Glasscock v. Glasscock*, 94 Ind. 163. See, also, *Stoner v. Stoner*, 9 Ind. 505.

forth as a cause for divorce resembles a tort more than it does a "contract" or "transaction" referred to in the code. Under the New York Code the counter-claim "must arise out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." It was held that plaintiff's adultery cannot be set up as a counter-claim against the defendant's adultery. The adultery of the plaintiff which is set up as a counter-claim does not arise out of the "contract or transaction set forth in the complaint," for that transaction is the alleged adultery of the defendant. Nor is the offense "connected with the subject of the action," for that is the wrongful act of the defendant.<sup>1</sup> It would seem that this is a correct interpretation of the terms of the code. The term *counter-claim* is not applicable to a cause for divorce, which is neither a tort or a breach of contract, but is cause of action unlike all other causes. The better view is that the terms *counter-claim*, *contract* and *transaction* have no reference to marriage or divorce, and do not authorize affirmative relief in divorce cases.<sup>2</sup> The courts would then be free to follow the ecclesiastical practice.<sup>3</sup> There is, however, some slight ground for holding one cause for divorce a cross-demand "relating

<sup>1</sup> *H. v. H.*, 40 Barb. 9; *Spahn v. Spahn*, 12 Abb. N. C. 169; *Henry v. Henry*, 25 How. Pr. 5; *McIntosh v. McIntosh*, 12 How. Pr. 289; *Terhune v. Terhune*, 40 How. Pr. 258. But affirmative relief is now permitted under certain amendments of the New York Code. See *Van Benthuyzen v. Van Benthysen*, 17 N. Y. St. Rep. 978, 15 Civil Pro. 234. See, also, *Waltermire v. Waltermire*, 110 N. Y. 183, 17 N. E. 739; *Finn v. Finn*, 62 How. Pr. 83; *Grif-*

*fin v. Griffin*, 23 How. Pr. 189; *Doe v. Roe*, 23 Hun, 19; *McNamara v. McNamara*, 2 Hilt. (N. Y.) 548, 9 Abb. Pr. 18; *Campbell v. Campbell*, 12 Hun, 636; *Bleck v. Bleck*, 27 Hun, 296; *Linden v. Linden*, 36 Barb. 61.

<sup>2</sup> *De Haley v. De Haley*, 74 Cal. 489, 16 P. 248. See *contra*, *Wilson v. Wilson*, 40 Ia. 230.

<sup>3</sup> *Wuest v. Wuest*, 17 Nev. 217, 30 P. 886.

to or depending upon the contract or transaction upon which the action is brought.”<sup>1</sup> In Oregon it is held that a cause for divorce is sufficiently “connected with the subject of the suit” to constitute a counter-claim within the definition of the code.<sup>2</sup>

The plaintiff may at any time obtain a dismissal of his bill, and if the defendant has answered by general denial or sets up other defenses and asks that the suit be dismissed, the dismissal of the original bill will, as a general rule, carry with it the entire proceeding.<sup>3</sup> But if the defendant has filed a cross-bill setting up a cause for divorce or a ground for the annulment of marriage, the dismissal of the original bill will not deprive the defendant of the right to prosecute the cross-suit as an independent action.<sup>4</sup> The defendant may proceed with the case and obtain a decree of divorce if the evidence is sufficient.<sup>5</sup> Or may obtain a decree of alimony where such relief is granted without a decree of divorce.<sup>6</sup> There is no good reason why the whole action can be dismissed by the act of one party, and the defendant forced to the delay and expense of another proceeding. If the defendant is in fact the injured party and has a cause

<sup>1</sup> *Wadsworth v. Wadsworth*, 81 Cal. 182, 22 P. 648. See, also, *Mott v. Mott*, 82 Cal. 413, 22 P. 1140; *Blakely v. Blakely*, 89 Cal. 324, 26 P. 1072; *Kirsch v. Kirsch*, 83 Cal. 663, 23 P. 1083.

<sup>2</sup> *Dodd v. Dodd*, 14 Or. 338, 13 P. 509.

<sup>3</sup> *Donahue v. Mariposa Mining Co.*, 1 Pac. L. J. 219; *Cont. Life Ins. Co. v. Webb*, 54 Ala. 688; *Thomason v. Neely*, 50 Miss. 310.

<sup>4</sup> *Butler v. Butler*, 38 N. J. Eq. 626; *Ficke v. Ficke*, 62 Mo. 335; *Campbell v. Campbell*, 12 Hun, 636; *Deweese v. Deweese*, 55 Miss. 315; *Schira v. Schira*, 1 P. & M. 466; *Blackborne v. Blackborne*, 1 P. &

M. 563. See also *Dawson v. Amey*, 13 Stew. Eq. 496; *Daniel's Ch. Pl. & Pr.* 1553. In Indiana the dismissal at one time deprived the defendant of affirmative relief. *Stoner v. Stoner*, 9 Ind. 505; *Jenness v. Jenness*, 24 Ind. 355; *Barr v. Barr*, 81 Ind. 240; *Armstrong v. Armstrong*, 27 Ind. 186. But the statute now provides that after such dismissal the defendant may proceed to trial without further notice to the adverse party. *Musselman v. Musselman*, 44 Ind. 106.

<sup>5</sup> *Mott v. Mott*, 82 Cal. 413, 22 P. 1140.

<sup>6</sup> *Deweese v. Deweese*, 55 Miss. 315; *Butler v. Butler*, 38 N. J. Eq. 626.

for divorce, no interest of the state requires that a new action must be commenced to determine his rights.

**§ 746. Application for temporary alimony.**—The application for temporary alimony should be in the nature of a motion, supported by the petition or answer and by affidavits showing a probable cause for divorce or a defense, and also that a *de facto* marriage relation exists between the parties; that the husband has property and ability to pay alimony, and that the wife is without available means to prosecute the suit. In England, and in some of the United States, the application is in the nature of a petition called an “allegation of faculties,” or a “petition for alimony.”<sup>1</sup> No notice of this application is necessary in the absence of statutes requiring it.<sup>2</sup> But where the application is by motion, supported by affidavit, the same notice will be required according to the practice of the court on ordinary motions.<sup>3</sup> The application is not ordinarily made by the plaintiff until an issue is raised by demurrer or answer.<sup>4</sup> No application

<sup>1</sup> In New York the application for temporary alimony and attorney's fees may be made by motion. A proceeding by petition is not necessary. *Kirch v. Kirch*, 45 St. Rep. 287, 18 N. Y. Supp. 447.

The application is by motion in the following states: *Vandergrift v. Vandergrift*, 30 N. J. Eq. 76; *Letowich v. Letowich*, 19 Kan. 451; *Reeves v. Reeves*, 82 N. C. 348; *Swearingen v. Swearingen*, 19 Ga. 265; *Becker v. Becker*, 15 Ill. Ap. 247; *Simpson v. Simpson* (Ia.), 59 N. W. 22; *Finn v. Finn*, 62 Ia. 482.

<sup>2</sup> *Becker v. Becker*, 15 Ill. Ap. 247. In Kentucky no notice is required where the petition for divorce contains a prayer for temporary alimony. “For all purposes sought to be accomplished by the allegations and the prayer of the

petition, the defendant must be presumed to be in court at all times after the service of process on him for the period specified in the decree.” *Lochnane v. Lochnane*, 78 Ky. 467. Where, on an application for alimony *pendente lite*, the court makes an order requiring the husband to appear and show cause why the same should not be granted, no notice of said application is required previous to the entry of said order. *Mudd v. Mudd*, 98 Cal. 320. The notice required by statute need not specify the time and place of the hearing. *Zimmerman v. Zimmerman*, 113 N. C. 432.

<sup>3</sup> But see, *contra*, *Curtis v. Curtis*, 54 Mo. 351.

<sup>4</sup> See § 854.

should be made by defendant until an answer or demurrer is filed, for it would seem that a *bona fide* defense should be interposed, otherwise there is no adequate showing of necessity for a defense or of the merits of the case.<sup>1</sup> Generally the application for temporary alimony should be made before the expenses are incurred, as the alimony is properly an allowance for future expenses. In some instances the courts have declined to make any allowance for expenses already incurred, because it is not "necessary to enable the wife to carry on the action."<sup>2</sup> It is thought that the language of the statute will not permit the court to pay expenses incurred by the wife in her defense unless there is a showing that the payment of these expenses is necessary to a further prosecution of the suit.<sup>3</sup>

This interpretation is too narrow, as the statute was evidently intended to confer upon the court the ordinary power of a court of equity, and not to prevent the court from making such allowances as were incurred in good faith and upon the implied power of the court to make such orders at discretion at any stage of the case. Such interpretation is not followed so far as it relates to costs and attorney's fees.<sup>4</sup>

**§ 747. Application for permanent alimony.**—The application for permanent alimony should be made a part of the petition for divorce.<sup>5</sup> It is a part of the relief prayed for, and is also a part of the remedy provided in the decree. In

<sup>1</sup> But a showing may be made by plaintiff in some states before the return day of the writ. See *Russell v. Russell*, 69 Me. 336. In *Deane v. Deane*, 28 L. J. Mat. Cas. 23, it was held that no alimony would be granted where there was no appearance by the husband, as the case can then be disposed of without a contest.

<sup>2</sup> *McCarthy v. McCarthy*, 137 N. Y. 500; *Beadleston v. Beadlest&n*, 103 N. Y. 402; *Emerson v. Emerson*, 26 N. Y. Supp. 292; *Loveren v.*

*Loveren*, 100 Cal. 493, 35 P. 87; *Mudd v. Mudd*, 98 Cal. 322.

<sup>3</sup> *Bohnert v. Bohnert*, 91 Cal. 428, 27 P. 732; *Atherton v. Atherton*, 82 Hun, 179.

<sup>4</sup> See Attorney's fees, §§ 875-882.

<sup>5</sup> This is the practice in the code states. In New York the application for permanent alimony is usually "incorporated in the complaint with appropriate averments, and the evidence relating to it on both sides, taken upon the trial of the principal issue, where it is had

all cases where the petition asks for injunction to restrain the husband from transferring his property to defeat the decree for alimony; or where attachment, restoration or division of property is sought, the petition or cross-bill would be defective, unless the petition or cross-bill stated sufficient facts to entitle the party to a decree for alimony.<sup>1</sup> As the practice in suits for divorce generally conforms to the chancery practice, it is necessary in some states to make the application a part of the petition for divorce, especially where third persons are made parties, and relief is prayed against them.<sup>2</sup>

**§ 748. Decree.**—A decree of divorce should be similar in form to a decree in equity. It should be a complete decree and not an order directing that a decree be entered.<sup>3</sup> It should disclose the date when it was rendered.<sup>4</sup> A decree does not relate back unless so provided.

Every decree of divorce should recite the facts necessary to show the jurisdiction of the court. If this is done the jurisdiction will be presumed; unless the want of it affirm-

before the court or a referee; but if the defendant insists upon his right to a jury trial, there would be a manifest impropriety in taking in their presence the testimony relating to the question of alimony. The practice to be pursued in each case must be left in a great measure to the sound discretion of the trial court." Galusha *v.* Galusha, 138 N. Y. 272.

<sup>1</sup> When permanent alimony granted, see Permanent alimony, §§ 900-917.

<sup>2</sup> An objection to including such application in a suit for divorce was overruled by the Wisconsin court. It was said: "Although it is perhaps not absolutely necessary in an action for divorce and alimony to set forth the amount of the husband's property, the particulars of its situation, and the

sources from whence it was derived, yet it seems to be the usual practice in this country—though not in England—to do so. In England, alimony is made the subject of a special application or petition, separate and distinct from the libel for divorce. But we think that ours is the better practice, in that it accords with the analogies of the equity procedure, by including in the bill or complaint all the allegations of fact upon which it may be necessary for the court to adjudicate for the purpose of a complete determination of all matters involved in the action." Damon *v.* Damon, 28 Wis. 510. See form of petition in this case in § 758.

<sup>3</sup> *In re Cook*, 77 Cal. 220.

<sup>4</sup> *Cook v. Cook*, 144 Mass. 163.

atively appears.<sup>1</sup> The residence of the plaintiff in the state for the required time should be stated. The service of process should be stated unless the record shows that the defendant appeared. If the divorce is granted upon default, the manner of service and its due execution should be stated. It is sufficient to state that the summons was served according to law, or that notice by publication was duly given. If the manner of service is stated in detail, some error or omission may make the record disclose a lack of jurisdiction when in fact the court had it. Or if there is a defect in the notice the detailed statement may disclose such defect.<sup>2</sup> The marriage may be properly stated in the decree, but an omission to find that the parties were married will not be fatal; as such fact is disclosed in the record of the case. The kind of divorce granted, whether a decree of separation or an absolute decree, should be stated, otherwise the word "divorce" without qualification means an absolute divorce from the bonds of matrimony.<sup>3</sup> The decree should be based upon the pleadings and not upon issues erroneously raised at the trial.<sup>4</sup> Thus where the only charge of adultery was with a certain person, a decree finding defendant guilty of adultery with a person whose name is unknown is erroneous and will be reversed.<sup>5</sup> The decree should disclose the cause or causes for which it was granted.<sup>6</sup> The name of the party against whom the decree was granted should be stated in the decree.

<sup>1</sup> *S. v. Armington*, 25 Minn. 29; *decree finds defendant guilty of Brannon v. P.*, 1 Ill. Ap. 496.

<sup>2</sup> As in *Tucker v. People*, 122 Ill. 583, where the decree disclosed that the court had no jurisdiction; as the notice was not published the required length of time.

<sup>3</sup> *Miller v. Miller*, 33 Cal. 353.

<sup>4</sup> *Haltenhoff v. Haltenhoff*, 25 Ill. Ap. 236; *Weber v. Weber*, 16 Or. 163. In such case if the complaint does not state a cause for divorce it will be dismissed on appeal. *Ward v. Ward*, 20 Wis. 266. If a

<sup>5</sup> *Bokel v. Bokel*, 3 Edw. Ch. 376. <sup>6</sup> *Young v. Young* (Tex.), 23 S. W. 83. A failure to state the cause for divorce does not render the decree void. *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Wells v. Wells* (N. Y.), 10 St. Rep. 248.

Where this is omitted, the decree will be presumed to be in favor of the wife where she obtains alimony and the custody of the children.<sup>1</sup> This is especially true where defendant has filed a cross-bill and contested the case.<sup>2</sup>

The failure to enter findings in regard to both petition and cross-petition is not always a reversible error.<sup>3</sup> The form of the finding may render it unnecessary to make separate findings as to both pleadings.<sup>4</sup>

<sup>1</sup> *Eskholm v. Rau*, 34 La. An. 546.

Form of decrees of divorce, see §§ 762-765.

For effect of decrees of divorce, see §§ 1020-1034.

Nature and effect of divorce from bed and board, § 1022.

Form of decree of separation, § 764.

Effect of decree *nisi*, § 1021.

Decrees of divorce, in general, § 1020.

Divorce from the bonds of matrimony, § 1024.

Effect of absolute divorce on property rights, §§ 1024-1034.

Effect of decree annulling marriage, § 1023.

Forms of nullity decree, § 765.

Order for temporary alimony, § 860.

Form of order, § 761.

Order for permanent alimony, §§ 930-944.

Form of order, § 766.

Order for custody of children, § 984.

Form of order, § 767.

Order for attorneys' fees, § 880.

Vacating and annulling decree for fraud, §§ 1050-1057.

When default set aside, § 775.

<sup>2</sup> In *Gullett v. Gullett*, 25 Ind. 517, the defendant filed a cross-bill, and the court, after hearing the

evidence offered by both parties, found that a divorce ought to be granted, "not upon the application of either party, but upon the whole case." Held erroneous and suit dismissed.

In *Cassiday v. Cassiday*, 63 Cal. 352, the court made no finding upon the answer and cross-petition of the defendant, but found that "all the *material* allegations of facts set forth in plaintiff's complaint are sustained and proven by the evidence." It was held that such finding was insufficient, because not responding to all the material issues made by the pleadings.

<sup>3</sup> *Haley v. Haley*, 44 Ark. 429.

<sup>4</sup> In *Pollock v. Pollock*, 71 N. Y. 137, the referee reported that one party was guilty and the other not guilty. The finding of the court that plaintiff was guilty "as charged in the answer" was held a sufficient compliance with the provisions of the code requiring the decision of the court to contain a statement of the facts found, and the conclusions of law, separately. The decree for alimony need not contain findings justifying the court in compelling the husband to furnish the wife separate maintenance.

A decree of divorce may reserve questions relating to alimony and the custody and support of the children for future consideration.<sup>1</sup> Or it may find the wife entitled to a divorce and alimony, and refer the matter to a master in chancery for further evidence.<sup>2</sup>

As the decree of divorce is final as to all property rights which are or might have been litigated in the divorce suit, the decree should contain specific and complete provisions relating to the property rights of both parties. The rights of courtesy and dower should be expressly reserved or extinguished by the decree.<sup>3</sup> The order for the custody and support of the children, the order for alimony or a division or restoration of property, and the order for attorneys' fees, are usually incorporated in the final decree of divorce.<sup>4</sup> The decree may be amended during term as other judgments and decrees.<sup>5</sup>

*Dooley v. Dooley*, 19 Ill. Ap. 391. But where no answer is filed, findings are not required. *Reading v. Reading*, 96 Cal. 4, 30 P. 803.

<sup>1</sup> *Ambrose, Ex parte*, 72 Cal. 398; *Cooledge v. Cooledge*, 1 Barb. Ch. 77.

<sup>2</sup> See form of order in *Knowlton v. Knowlton*, 40 Ill. Ap. 588.

<sup>3</sup> If left in doubt as to dower the decree may be amended. *Leeman v. Leeman*, Stephen's Digest (Ont.), 495.

<sup>4</sup> But it is held that the order for attorneys' fees is not a proper portion of the final decree of di-

vorce. *Williams v. Williams*, 6 N. Y. Supp. 645.

<sup>5</sup> *R. v. R.*, 20 Wis. 331; *Reading v. Reading*, 96 Cal. 4, 30 P. 803; *Moster v. Moster*, 53 Mo. 326; *Tucker v. Tucker*, 122 Ill. 558; *Carley v. Carley*, 7 Gray, 545; *Oades v. Oades*, 6 Neb. 304.

When default set aside, § 775.

Modification of decrees of alimony, § 934.

Modification of order for custody and maintenance of children, § 985.

For procedure in vacating decree for fraud, see § 1057.

Application or petition to annul decree obtained by fraud, § 1057.

## FORMS OF PLEADINGS AND DECREES.

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| <p>§ 750. In general</p> <p>751. Petitions for divorce.</p> <p>752. Petition for divorce on account of cruelty.</p> <p>753. Answers in suits for divorce.</p> <p>754. Answer and cross-petition for divorce.</p> <p>755. Petition for annulment of marriage.</p> <p>756. Petition to annul marriage contracted in good faith and to have children declared legitimate.</p> <p>757. Petition for maintenance of child after divorce.</p> <p>758. Petition to set aside a fraudulent conveyance.</p> <p>759. Petition for alimony without divorce.</p> | <p>§ 760. Applications for alimony.</p> <p>761. Order for temporary alimony.</p> <p>762. Decrees of absolute divorce.</p> <p>763. Default upon constructive service.</p> <p>764. Decree of separation or limited divorce.</p> <p>765. Decree of nullity.</p> <p>766. Decree for permanent alimony.</p> <p>767. Decree awarding alimony, custody of children and use of homestead.</p> <p>768. Decree restraining sale of property and restoring the wife's property and awarding use of homestead.</p> |
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**§ 750. In general.**—There is no uniform practice relating to the divorce suit, as the suit is in some states a proceeding in equity and in other states a proceeding under the code of civil procedure. The following forms of pleadings and decrees are selected with reference to the states having codes of civil procedure; but it is believed that, with some variations required by local practice, the forms will be sufficient in either form of procedure. The forms given are mere outlines, suggesting the nature of the pleadings required, and are to be varied according to the nature of the case. Some of the forms are taken from the reports, and, although held sufficient by the courts, are not always free from objection, but will be useful in suggesting to the pleader the necessary form which his case may require.

**§ 751. Petition for divorce.**—The following is a common form of the petition for divorce:

1. The plaintiff, ——, alleges that she is now, and has been for more than [*statutory period of residence*] immediately preceding the filing of this petition, a resident of —— county, in the state of ——; and that said residence has been in good faith and not for the purpose of obtaining a decree of divorce.<sup>1</sup>

2. That on the —— day of ——, in the city of ——, in —— county, ——, the plaintiff, whose maiden name was ——, married ——, the defendant, and said parties lived together as man and wife until the —— day of ——, 18—.<sup>2</sup> That during all of the time said parties lived together, the plaintiff conducted herself as a faithful, chaste and obedient wife.<sup>3</sup>

3. That on the —— day of —— [*or at various times during the months of —— and ——*] the defendant had sexual intercourse with one —— [*or if the name is unknown the allegation may be, "with a woman whose name is unknown to the plaintiff"*] at the house of ——, at No. ——, —— street, in the city of ——. [The following allegation is sometimes required: “Without the connivance or collusion of the plaintiff, who has not condoned or forgiven such offense.”]<sup>4</sup>

4. That the following children are the issue of said marriage of plaintiff and defendant [*here state names and ages of children*], who are now living with plaintiff [*or other person, as the case may be*].

5. That defendant is leading an immoral life, has no permanent residence, is violent and cruel in his treatment of children [*state other facts showing unfitness*], and is wholly unfit to be intrusted with the care and education of children.

6. That plaintiff has personal property consisting of [*here describe it*], worth about —— dollars, and also the following described real estate, ——, worth about —— dollars, but mortgaged for the sum of —— dollars, and none of said property produces an income or can be sold or converted to

<sup>1</sup> See Allegation of jurisdiction, § 731.

<sup>4</sup> When pleading is indefinite, §§ 182, 183.

<sup>2</sup> See How marriage alleged, § 732.

<sup>When name of paramour is not required, § 181.</sup>

<sup>3</sup> See Plaintiff need not anticipate defenses.

<sup>Variance of time and place, §§ 184, 185.</sup>

plaintiff's use. [Or allege that "plaintiff has no property in her own right, and no means with which to prosecute this suit and maintain herself and children (except —), —.]

7. That defendant has personal property consisting of [*here describe it*], worth about — dollars, and is the owner in fee of the following described real estate [*described as in a conveyance*]; and defendant also owns the property now occupied by plaintiff and said children as a homestead, and described as follows: [*description*], and worth about — dollars, and mortgaged for the sum of — dollars. That plaintiff is without means to support said children and to prosecute this action, and said defendant has neglected and refused to support the plaintiff and said children.<sup>1</sup>

Therefore plaintiff prays that she may be divorced from said defendant, and that said marriage be dissolved; that she may be given the custody of said children; that she may be allowed to remain in said homestead; that the said real estate be divided between the parties, and that defendant be decreed to pay a reasonable sum of alimony, and for such other relief as may be just and equitable.<sup>2</sup>

A. B., by — —, her Attorney.  
[Add the required verification.]<sup>3</sup>

Other causes for divorce may be alleged as follows:

### *Cruelty.*

That the defendant has been guilty of extreme cruelty [*use statutory term*] towards the plaintiff, in this, that on the — day of —, and at numerous times thereafter until the — day of —, defendant accused plaintiff of having committed adultery with one — —. That said accusation was repeated before plaintiff's friends and relatives, and has caused plaintiff severe mental suffering, thereby rendering plaintiff's condition intolerable and impairing her health. Plaintiff denies that she has committed adultery with — —, or with any other person, and alleges that she has conducted herself as a chaste and discreet wife, and that said accusation is utterly false and unfounded.<sup>4</sup>

<sup>1</sup> See Causes for ancillary relief, § 736.

<sup>2</sup> Prayer for divorce, see § 737.

<sup>3</sup> See Verification, § 738.

<sup>4</sup> For another form of allegation on the ground of cruelty, see § 752. For sufficiency of allegation of cruelty, see §§ 332-337.

*Desertion.*

That on the —— day of —— defendant deserted the plaintiff without just cause and has ever since been wilfully absent from plaintiff.<sup>1</sup>

*Habitual drunkenness.*

That after said marriage defendant commenced the excessive use of intoxicating liquors and has for more than [statutory period] been guilty of habitual drunkenness.<sup>2</sup>

*Imprisonment.*

That on the —— day of —— and at the —— term of the —— court of —— county, —— ——, the defendant, was duly convicted of the crime of ——, and was thereupon sentenced by said court to confinement in the penitentiary of the state of —— for the period of —— years. That defendant is now confined in said penitentiary in pursuance of said sentence, which now remains in full force and effect, and that no proceedings to reverse said sentence are now pending.<sup>3</sup>

*Gross neglect of duty.*

That the defendant for more than —— years last past has been guilty of gross neglect of duty towards plaintiff, in that by reason of his idleness and dissipation he has wilfully failed and neglected to provide this plaintiff and their said children with food and clothing and the common necessaries of life, so that she has been compelled to live by her own exertions and labor, and on the assistance and charity rendered by her relatives, although he was fully able to properly support her and her said children.<sup>4</sup>

*Neglect to provide or failure to support.*

That the defendant has for more than —— years last past been guilty of gross neglect of duty toward plaintiff, in that he has separated from plaintiff without the fault of plaintiff, and has during said time wilfully failed and neglected to provide plaintiff with the common necessaries of life [*or to contribute anything towards the support of plaintiff*].

<sup>1</sup> Or the facts causing separation      <sup>3</sup> Effect of proceedings in error, may be alleged. See §§ 111-114.      see § 361.

<sup>2</sup> For sufficiency of this allegation, see Habitual drunkenness, § 359.      <sup>4</sup> For facts constituting gross neglect of duty, see § 382.

That during said time defendant was in receipt of — dollars per month income from his business [*or*, was in constant receipt of wages sufficient for their joint support, to wit, about — dollars per month], [*or*, that plaintiff, being in good health and having strength and ability to labor, and being offered employment, has refused to labor, and has failed to provide plaintiff with the common necessities of life, because of idleness and dissipation].<sup>1</sup>

The following forms have been prepared by the judges of the English courts according to the provisions of the statute, directing them to make such rules and regulations concerning the practice and procedure as they may deem expedient:

*Petition.*

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Divorce.)

To the Right Honorable the President of the said Division:

The — day of —, 18—.

The petition of A. B., of —, sheweth:

1. That your petitioner was, on the — day of —, 18—, lawfully married to C. B., then C. D. [spinster or widow], at the *parish church of*, etc.

[*Here state where the marriage took place.*]

2. That after his said marriage your petitioner lived and cohabited with his said wife at — and at —, and that your petitioner and his said wife have had issue of their said marriage — children, to wit:

[*Here state the names and ages of the children, issue of the marriage.*]

3. That on the — day of —, 18—, and on other days between that day and —, the said C. B., at —, in the county of —, committed adultery with R. S.

4. That in and during the months of January, February and March, 18—, the said C. B. frequently visited the said C. B. at —, and on divers of such occasions committed adultery with the said R. S.

Your petitioner therefore humbly prays:

That your lordship will be pleased to decree:

[*Here set out the relief sought.*]

And that your petitioner may have such further and other relief in the premises as to your lordship may seem meet.

[*Petitioner's signature.*]

<sup>1</sup>For sufficiency of allegation, see § 378.

*Answer.*

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Divorce.)

The —— day of ——, 18—.  
A. B. v. C. B.

The respondent C. B., by C. D., her solicitor [*or, in person*], in answer to the petition filed in this cause, saith:

1. That she denies that she committed adultery with R. S., as set forth in the said petition:

2. Respondent further saith that on the —— day of ——, 18—, and on other days between that day and ——, the said A. B., at ——, in the county of ——, committed adultery with K. L.

[*In like manner respondent is to state connivance, condonation, or other matters relied on as a ground for dismissing the petition.*]

Wherefore this respondent humbly prays:  
That your lordship will be pleased to reject the prayer of the said petition and decree, etc.

**§ 752. Petition for divorce on account of cruelty.**—The following petition illustrates the form in which specific acts of cruelty should be alleged. After alleging the marriage and residence in the state, the petition contained the following allegations of cruelty:

“(2) That on February 1, ——, the defendant was guilty of extreme cruelty towards her, without any cause or provocation, in this: That, having put on his overcoat to go out of his house, and for no cause whatever, became angry, and began to curse and swear and to use violent language towards plaintiff, calling her all kinds of vulgar and vile names, and taking hold of her person in a rude and violent manner, striking her with his clinched fists. He threw and knocked her to the floor, and threw his whole body and weight upon her with so much violence and force as to injure the whole side, body and head of the plaintiff, so that she was for a long time sick and sore from said injuries, and, after she got up from the floor, he chased her about the house, jamming her in the door as she was escaping from him.

“(3) On the 1st day of February he was guilty of extreme cruelty towards her, without any cause or provocation on her part, in the use of violent, indecent and profane language and conduct, calling her “a —— bitch, and old whore,” and other like names.

"(4) In the spring of —, in the presence of plaintiff's daughter, he was guilty of extreme cruelty towards plaintiff, without any cause or provocation, and at divers times during that spring, at their home, in this: That he called her "a whore, a damned bitch," and other like names, and frequently, during said spring, struck her with his fists, and assaulted and battered her.

"(5) That he is a man of vicious and vulgar habits, with a quick and bad temper, of a jealous, selfish and revengeful disposition, and has often declared that he would never live with plaintiff, nor permit her to live with him; and that on the first Monday in April, —, on account of his violent conduct and abusive language, she, being in fear of great bodily injuries, if not of her life, left her home, and has since lived apart from defendant, and has supported herself."<sup>1</sup>

**§ 753. Answers in suits for divorce.**—The following forms will suggest the necessary allegations in answer to the petition for divorce:

[*Title of cause.*]

1. The defendant, in answer to the plaintiff's petition, denies each and every allegation therein contained except as hereinafter admitted.
2. The defendant admits that the plaintiff has resided in this state and county for more than — years immediately preceding the filing of said petition.

*Denial of marriage.*

3. The defendant denies that the parties to this action were married at the time alleged in said petition or at any other time. The defendant further denies that he agreed to become the husband of the plaintiff, or that he affirmed or consummated the marriage alleged in said petition, or that he recognized plaintiff as his wife either in public or private, or introduced her to others as his wife, or that he spoke of her as such in the presence of others, or that the parties herein are reputed to be husband and wife.

*Recrimination.*

The defendant further alleges that the plaintiff has been guilty of [*here state a cause for divorce as in the form of a petition*], and that defendant on discovering said offense [*or, after the commission of said offense*] separated from plaintiff and has not condoned or forgiven said offense.

<sup>1</sup> *Paden v. Paden*, 28 Neb. 275, 44 N. W. 228.

*Condonation.*

The defendant further alleges that on or about —, —, and after the acts alleged in plaintiff's petition, the plaintiff voluntarily forgave the alleged offense and resided and cohabited with defendant as his wife during —, —.

*Justification for cruelty.*

The defendant further alleges that at the time referred to in the first paragraph of plaintiff's petition, the plaintiff attempted to strike defendant with a chair, without any cause or provocation on his part; that, in order to protect himself, defendant immediately took the chair away from her, using no more force or violence than was necessary. That plaintiff then seized a heavy cane and attempted to strike him therewith, and defendant was compelled to take the cane away from her to protect himself from injury, which he did, using no more force or violence than was necessary. That any injuries the plaintiff may have received in resisting defendant's efforts to protect himself were not voluntarily inflicted with intent to injure the plaintiff. Defendant denies that he struck or beat the plaintiff, as alleged in said petition, or used any violence towards her except as herein set forth.

**§ 754. Answer and cross-petition for divorce.—**

1. The defendant, in answer to the plaintiff's petition, denies each and every allegation therein contained, except as hereinafter admitted.
2. The defendant admits that for more than — years immediately preceding the filing of said petition the plaintiff has been a resident of this state, and that the parties to this action were married as alleged in said petition.
3. The defendant denies that he committed adultery with — — at the time and place alleged in said petition.
4. The defendant alleges that since the filing of said petition the plaintiff has voluntarily cohabited with the defendant as his wife, and thereby condoned the offense alleged in said petition.
5. The defendant alleges that the plaintiff had sexual intercourse with one — —, at defendant's residence during his absence, in the months of September and October, —; and the defendant, on discovering said offense, ceased to cohabit with the plaintiff, and has not condoned her offense.
6. [Add allegation concerning property.]

Therefore defendant prays that the plaintiff's petition be dismissed, that he be divorced from the plaintiff, and that said marriage be dissolved, and for such other relief as may be just and equitable.

C. B., by — —, his Attorney.

[*Add verification if required.*]

**§ 755. Petition for annulment of marriage.**—The petition for annulment of marriage is similar in form to the petition for divorce.<sup>1</sup> The following petition will suggest the form for annulment on the ground of fraud:

1. [*Allege residence as in a petition for divorce.*]

2. [*Allege the marriage.*]

3. Plaintiff alleges that said defendant, for the purpose of inducing and persuading this plaintiff to enter into said marriage, falsely and fraudulently represented herself to be a virtuous and chaste woman, when in truth and in fact she was not, but was then pregnant by some man other than this plaintiff.

4. Plaintiff, relying upon the representations so made by said defendant, and believing the same to be true, entered into said marriage, which he would not have done had not said false representations been made to him. That immediately upon discovering that said representations were false, to wit, on or about the — day of —, 18—, he ceased to live and cohabit with said defendant and has ever since remained away from her.

5. That plaintiff, believing said marriage to be valid, on or or about —, —, conveyed to the defendant the property now occupied by plaintiff as a homestead and described as follows, to wit: [*description of property.*] That said property was owned by plaintiff before said marriage, and that defendant has contributed nothing toward the improvement of the same. Plaintiff further says that he received no property of any kind from the defendant.

Therefore plaintiff prays that said marriage may be declared null and void and that the conveyance of said real estate, to wit [*description of property*], may be vacated and set aside and the title of the same declared to be in the plaintiff, and for such other relief as may seem just and equitable.

<sup>1</sup> For forms of petition to have marriage declared valid, see Gibson v. Gibson, 24 Neb. 394, 39 N. W. 450.

Other causes for annulment of marriage may be alleged as follows:

*Physical incapacity.*

That at the time of said marriage the defendant was and has ever since continued to be wholly incapable to consummate said marriage by reason of the [*here state the nature of the incapacity, as: malformation of her parts of generation, or the frigidity and impotence of his parts of generation*], and that such incapacity is incurable.

*Prior marriage undissolved.*

That at the time of the said marriage of plaintiff the defendant had a former [husband *or* wife] living, and not divorced.

*Mental incapacity.*

That at the time of said marriage the plaintiff was [*insane, feeble-minded *or* intoxicated*], and therefore incapable of understanding the nature of the marriage contract, and incapable of entering into the marriage relation. That plaintiff is now of sound mind, and has not affirmed or in any way ratified said marriage.

*Non-age.*

That at the time of said marriage the plaintiff was but — years of age and the defendant was but — years of age, and therefore incapable of contracting marriage.

That before the plaintiff was [*age of consent*] years old she separated from defendant, and has not in any way ratified or affirmed said marriage.<sup>1</sup>

**§ 756. Petition to annul a marriage contracted in good faith and to have the children declared legitimate.—**

1. [*Allege facts showing jurisdiction as in the petition.*]
2. [*Allege the marriage.*]
3. The plaintiff alleges that before said marriage the defendant married one A. D., at —, in — county, —, and that said parties cohabited as husband and wife until about the — day of —, 18— [*here allege facts showing a prior marriage undissolved*], and that said marriage of plaintiff with defendant was entered into subsequently but with good faith on the part of plaintiff and with a full belief that the said A. D. was [*dead *or* divorced*].

<sup>1</sup>For form of petition to annul marriage on the ground of fraud, error and duress, see cases cited in § 624.

4. [Here allege the facts showing that a decree of divorce is void, or that the said A. D. was living at the time said marriage was entered into.]

5. That the issue of the said marriage of the plaintiff and defendant is as follows: [give names and ages of children.]

The plaintiff therefore prays that said marriage between the plaintiff and defendant may be declared null and void, and that said marriage was contracted in good faith and with the full belief that the said A. D. was [dead or divorced], and that said children be declared legitimate, and for such other relief as may be just and equitable.

A. B., by ——, her Attorney.

[Add the required verification.]

**§ 757. Petition for maintenance of child after divorce.—**  
The following petition has been sustained as stating a cause of action against the husband for the maintenance of a child after a decreee of divorce in which the wife was allowed permanent alimony and the custody of the child, but made no provision for the support of the child:<sup>1</sup>

"The plaintiff, I. P., for her petition against the defendant, J. P., says that on or about the — day of —, 18—, she was married to the defendant; that there was issue of said marriage a son, A. P., who still lives, and is now — years of age; that at the — term of the court of common pleas in and for the county of —, in the state of —, such proceedings were had by said court, in a certain action for divorce therein pending, in which action said plaintiff herein was plaintiff and said defendant herein was defendant; that said plaintiff was, on account of the misconduct and ill treatment and neglect of said defendant, by the judgment of said court of common pleas, divorced from said defendant, and awarded 'the custody, nurture, education and care of said minor child,' A. P.

"Plaintiff further says that ever since said decree of divorce was entered, said plaintiff and defendant have lived separate and apart, and said A. P., son of the said defendant, has been boarded and clothed and cared for by the plaintiff, and that such boarding, clothing, care and attention so furnished said son of the defendant by the plaintiff were necessary and appropriate to his comfort and condition in life, and were of the value of not less than — dollars per year.

"Said plaintiff further says that at the time said decree

<sup>1</sup> Sustained in Pretzinger v. Pretzinger, 45 O. 452, 15 N. E. 471.

of divorce aforesaid was granted, said defendant herein was insolvent, but that he has become and now is solvent and well able to support his said son.

“Plaintiff says that there is due and owing her from the defendant for said boarding, clothing and care, a specific account of which is hereto attached, marked Exhibit ‘A,’ the sum of — dollars, and interest; wherefore said plaintiff prays judgment against said defendant,” etc.

In this action it was held that the following answer did not state sufficient facts to constitute a defense to the above petition:

“That plaintiff in said cause, in — county common pleas court, asked that the care, custody and nurture of their said child be awarded to her, and that reasonable alimony be decreed her for the support of herself and their said child. That on the final hearing thereof the court decreed to the said plaintiff a divorce on the grounds of gross neglect of duty, and for no other cause, and he denies that said divorce was granted on account of ill treatment of plaintiff by this defendant.

“That the said court further decreed to plaintiff the care and custody of their said child at her special request, and against the wishes and requests of this defendant, and until the further order of said court, and decreed permanent alimony, in the sum of — dollars, in addition to the sum of — dollars in said cause allowed as temporary alimony, which said court found to be a reasonable sum for the support of herself and said child, as prayed for in her said petition; and that this plaintiff then and there appeared in open court and agreed to accept said sum, and did then and there accept said sum in full satisfaction of all alimony that she was or might be entitled to in the premises.”

**§ 758. Petition to set aside a fraudulent conveyance.—** The petition should allege all the facts necessary to state a cause for divorce, and also sufficient facts to constitute a cause of action, as in the ordinary cases. The following petition has been sustained as stating a cause of action when assailed by a general demurrer, and because the causes of action were improperly joined. The petition was in the usual form of a petition for divorce, and also alleged that the husband had, with the proceeds of the wife’s property, purchased certain property, and had directed the title

to be placed in the name of another in order to defeat her claim to the property, and proceeds, as follows:

"That the defendants, fraudulently contriving and combining together to cheat and defraud this plaintiff, and to prevent her recovery of and from the defendant C. D. support for herself and children, alimony, suit money, and the avails of the sale of the property received by him as aforesaid, caused the said E. F. and W. F. to deed the said real estate so purchased and paid for by the defendant C. D., as aforesaid and hereinbefore described, to the defendant A. D., and the defendant A. D., in pursuance of said fraudulent purpose and design, accepted said deed and caused the same to be recorded on the — day of —, 18—, in the office of the register of deeds for Dane county, Wisconsin, in volume — of Deeds, on page —."

"The plaintiff further shows that the defendant A. D. knew the plaintiff and defendant C. D. while they lived together as man and wife in the state of Massachusetts, and before their removal to the state of Wisconsin, and knew the relation that subsisted between them."

"The plaintiff further shows, upon information and belief, that the defendant A. D., prior to the purchase of the property of the said E. F. and W. F. by the defendant C. D., as hereinbefore stated, knew that the defendant C. D. took the avails of the sale of the plaintiff's property in Massachusetts, as hereinbefore alleged, and that he brought the same to Wisconsin, and at the time of said purchase knew that the same was used in paying the purchase-price of the real estate hereinbefore described."

"The plaintiff further shows that the defendant C. D. has threatened that if this plaintiff in any way interfered with, or commenced proceedings against him, he would dispose of all his property, leave the country and never return."

"The plaintiff further shows that she has now no property in her own right, but is entirely dependent for the support of herself and children, and their education, upon her own exertions and the kindness of her friends; that the present value of the property of the defendant C. D., as she is informed and believes, is about — dollars; that the real estate hereinbefore described has been much improved since the same was purchased by the defendant C. D., as before stated, and the same is now worth about — dollars."

The prayer was for divorce and alimony, and that said conveyance be set aside, and for general relief.<sup>1</sup>

<sup>1</sup> Damon *v.* Damon, 28 Wis. 510.

**§ 759. Petition for alimony without divorce.**—Where the statute permits alimony without divorce in certain cases, the petition must allege one of the statutory causes, and must conform to the provisions of the statute.<sup>1</sup> Where the application is made in a court of equity, the petition must allege sufficient facts to show a justifiable cause for separating from the husband and the necessity for separate maintenance. The following petition was held sufficient, although it does not allege the ability of the husband to pay alimony. After alleging a marriage and cohabitation, the petition continued in substance as follows:

“That about — defendant commenced to abuse and ill treat plaintiff, calling her a thief, and demanding explanations, and informing her that she could no longer live with him, or be supported by him, unless explanations of his accusations were made, of which plaintiff was not guilty;

“That on account of the violent abuse and unreasonable language of defendant, plaintiff was compelled to seek board and lodging elsewhere;

“That after plaintiff was compelled to leave defendant’s home, he circulated among her friends and neighbors false and scandalous stories concerning plaintiff’s chastity, knowing them to be false and without foundation;

“That during the last year of plaintiff’s living with defendant he ill treated her to such extent as to render her living with him detrimental to her health;

“That defendant peremptorily refused to support plaintiff or allow her in his house; and that plaintiff has no property, and is dependent on her own labor for support, and is unable to obtain employment, and compelled to incur indebtedness against defendant for board and lodging.”<sup>2</sup>

**§ 760. Applications for alimony.**—The application for permanent alimony is a part of the petition or cross-petition for divorce.<sup>3</sup> The application for temporary alimony is generally in the form of a motion supported by affidavits and the pleadings. The following has been suggested as a proper

<sup>1</sup> *Arnold v. Arnold* (Ind.), 39 N. E. also, allegations in *Earle v. Earle*, 862. See form of petition in *Carr v. Carr*, 27 Neb. 277, 43 N. W. 118.

<sup>2</sup> *Finn v. Finn*, 62 Ia. 482. See,

<sup>3</sup> See forms of petitions.

form for the application for temporary alimony, but it would seem that some of the facts alleged appear of record and in the pleadings, while the remaining facts could be properly set up in affidavits.

*Petition for alimony pendente lite where the wife is plaintiff.*

1. A. B., the plaintiff herein, respectfully states to the court that on the — day of —, 18—, she commenced an action in this court against C. D. for a dissolution of the marriage relation existing between them, upon the ground of — on the part of said defendant. A copy of the petition is hereto annexed and made a part hereof.

2. On the — day of —, 18—, said defendant answered the petition of the plaintiff in said action, denying the charge of — therein made, but the plaintiff alleges that said charge is true, and she will be able to prove the same on the trial of said cause.

3. The plaintiff is entirely without means to carry on this action or to support herself during its pendency, and [state the facts in regard to the number and age of children if in care of wife].

4. The defendant is possessed of the following real estate, to wit: [describe premises], which the plaintiff has reason to believe is free from incumbrances and is of the value of — dollars, and is also possessed of personal property to the value of — dollars.

The plaintiff therefore prays that the defendant may be required to pay the plaintiff a reasonable sum for her maintenance and support during the pendency of the action, and such further sum as will enable her to carry on this action.

[Verification.]

A. B.

*Petition for alimony pendente lite where wife is defendant.*

1. Your petitioner respectfully states to the court that on the — day of —, 18—, A. B. commenced an action in this court against her for a dissolution of the marriage relation existing between them, upon the ground of adultery.

2. On the — day of —, 18—, your petitioner filed an answer to said petition, denying all the allegations therein except the allegation as to the marriage between the plaintiff in said action and the defendant.

3. [Continue as in preceding form, changing the language to conform to the facts.]<sup>1</sup>

<sup>1</sup> Maxwell's Pleading and Practice, p. 659.

According to the practice in England the proceedings for alimony require a separate petition and answer, as such questions cannot be tried before a jury in an action in which the co-respondent is a party. The following form has been prescribed by the courts for applications for both temporary and permanent alimony:

*Petition for alimony.*

In the High Court of Justice. Probate, Divorce and Admiralty Division.

The — day of —, 18—.  
A. B. v. C. B.

The petition of C. B., the lawful wife of A. B., showeth:

1. That the said A. B. does now carry on, and has for many years past carried on, the business of a — at —, and from such business he derives the net annual income of £—.

2. That the said A. B. is now, or lately was, possessed of, or entitled to, — proprietary shares of the — Railway Company, amounting in value to £—, and yielding a clear annual dividend of £—.

3. That the said A. B. is possessed of certain stock in trade in his said business of a — of the value of £—.

[*In same manner state particulars of any other property which the husband may possess.*]

Your petitioner therefore humbly prays:

That your lordship will be pleased to decree her such sum or sums of money by way of alimony *pendente lite* [or, permanent alimony] as to your lordship shall seem meet.

**§ 761. Order for temporary alimony.**—The order for temporary alimony may include a provision for the custody and maintenance of the children during the litigation and also a specific sum for attorney's fees. The order may be to pay certain sums to the wife or to some person or officer for her use. In the western states the usual practice is to require all such payments to be made to the clerk of the court. In case the payments are not made as required, the clerk may, upon request of the plaintiff, issue execution against the defendant, as the order is a judgment in form

and effect. The following order will suggest the necessary provisions of the ordinary order for temporary alimony:

"It is ordered, adjudged and decreed that on or before the —— day of ——, 18—, the said defendant deposit with the clerk of this court the sum of \$100, for the use and benefit of the plaintiff for her costs herein to accrue, or which may accrue in said cause; also, for the plaintiff personally, for her personal use and benefit, the sum of \$50; also, the further sum of \$300 for plaintiff's counsel and attorney's fees herein,— each and every of the aforesaid payments to be made on or before the —— day of ——.

"It is further ordered, adjudged and decreed that on this —— day of ——, and every calendar month during the pendency of this suit, and so until the further order of the court, the defendant pay to the clerk of this court, for the plaintiff personally, the sum of \$25; that the defendant also, from this time forthwith, in addition to the monthly allowance due, furnish for the plaintiff and her children all reasonable food, fuel and clothing, or provide for her obtaining the same on his credit, and allow to her and said children the use of the house and residence mentioned in the pleadings herein, and now occupied by them, and the furniture and furnishings therein, as their abiding place and home, without let or hindrance; and, in case of failure of the said defendant to furnish food, fuel and clothing as aforesaid, or to furnish credit whereon and whereby plaintiff may procure the same, plaintiff has leave, without additional showing, to apply for an increase of the aforesaid monthly allowance; this without prejudice to the rights of either party hereafter to apply for a modification of this order as far as the aforesaid monthly allowance is concerned.

"It is further adjudged and decreed that in case of failure on the part of the defendant to pay any one or more of the aforesaid sums of money, or any monthly allowance aforesaid, the plaintiff may have execution to collect the same, with costs of issuing said execution, to be taxed, without prejudice to her rights to proceed against the defendant as for contempt."<sup>1</sup>

**§ 762. Decrees of absolute divorce.**—The decree of divorce should contain the findings of the court, and should state the nature of the divorce granted and the cause for

<sup>1</sup> This order was affirmed in *Cowan v. Cowan*, 19 Colo. 316, 35 P. 347.

which the decree was granted. It should be based on the pleadings, and should show whether the divorce is granted on the petition or cross-petition. If no appearance was made by defendant, the nature of the service may be stated as one of the jurisdictional facts. The following form may be followed where a decree is to be rendered in contested cases:

[*Title of cause.*]

This cause came on to be heard on this — day of —, 18—, upon the petition, answer and cross-petition and reply, and the evidence submitted in open court by both parties, and was submitted to the court; on consideration whereof the court finds that the plaintiff has been a resident of — county and state of — for — years before filing her petition herein; that the parties were married as alleged in said petition; that the defendant committed adultery as alleged in said petition. The court further finds that the plaintiff did not condone said adultery, and has not wilfully deserted the defendant as alleged in said answer and cross-petition, and said cross-petition is hereby dismissed.

Wherefore it is ordered, adjudged and decreed by the court that the marriage relation heretofore existing between — —, the said plaintiff, and — —, the said defendant, is hereby dissolved, and the said parties are, and each of them is, released from the bonds of matrimony.

It is further ordered [*insert provisions of decree concerning alimony, etc.*].

The following decree was held valid in a recent case, although it does not reveal the cause for divorce, and contained no special findings of fact, but a general finding that the material allegations of the complaint are true:<sup>1</sup>

“ This cause having been brought on to be heard this 20th day of November, 1883, upon the complaint herein taken as confessed by the defendant, whose default for not answering has been duly entered, and upon the answer of the state of Oregon being filed herein, and upon the proofs taken herein, and upon the report of Charles T. Hyde, referee in this case, to whom it was referred by order of this court duly made the 12th day of November, 1883, to take the

<sup>1</sup> Wilhite v. Wilhite, 41 Kan. 154, 21 P. 173.

proof of the facts set forth in the complaint, and to report the same to the court.

"And the said referee having taken the testimony by written questions and answers, and reported the same to the court on this 20th day of November, 1883, from which it appears that all the material allegations of the complaint are sustained by testimony free from all legal exceptions as to its competency, admissibility and sufficiency.

"And it also appearing to said court that the said defendant and T. C. Hyde, the district attorney of the sixth judicial district of Oregon, was duly served with process, and all and singular the law and the premises being by the court here seen, heard, understood and fully considered.

"Wherefore, it is here ordered, adjudged and decreed, and the court, by virtue of the power and authority herein vested, and in pursuance of the statute in such cases made and provided, does order, adjudge and decree that the marriage between the said plaintiff, Daniel W. White, and said defendant, Mary A. White, be dissolved, and forever held for naught, and the same is hereby dissolved accordingly, and the said parties are, and each of them is, freed and absolutely released from the bonds of matrimony, and all the obligations thereof.

"And it is further ordered and decreed that the custody of the minor children of said marriage, to wit, Thomas E. White, aged fifteen years, Rocella V. White, aged eleven years, Edward A. White, aged eight years, and Claudius E. White, aged seven years, be, and the same are hereby, awarded to the plaintiff."

**§ 763. Default upon constructive service.**— Where the decree of divorce is rendered upon default, and the service upon the defendant is not personal but some form of constructive service, the decree may recite the nature of the service and the default of the defendant, together with the usual findings.

[*Title of cause.*]

Now on this \_\_\_\_ day of \_\_\_\_, 18\_\_\_\_, this cause, came on to be heard, the plaintiff appearing in person and by her attorney, but the defendant, being duly called, appears not but makes default; whereupon this cause is submitted to the court upon the proof of publication and the petition of the plaintiff and the evidence; on consideration whereof the court finds: That defendant was duly served with summons

and a copy of said petition by delivering the same to the defendant in the city of —, and state of — [or, that due notice was given to the defendant by the publication of summons]; that defendant has failed to answer or demur to said petition; that the plaintiff has been a *bona fide* resident of — county, in the state, before the filing of her petition herein [or, has resided in the state of —, — years before the filing of her petition herein, and was, and now is, a resident of — county, in the state of —]; that on the — day of — the plaintiff was lawfully married to the defendant; that on the — day of — the defendant wilfully deserted the plaintiff without just cause and has ever since absented himself.

Wherefore it is ordered, adjudged and decreed by the court that the marriage existing between the said plaintiff, —, and the said defendant, —, be dissolved, and the same is hereby dissolved accordingly, and the said parties are, and each of them is, freed and absolutely released from the bonds of matrimony and all the obligations thereof; and it is further ordered and decreed that this cause be dismissed without prejudice to the plaintiff as to alimony and division of the defendant's property.

**§ 764. Decree of separation or limited divorce.**—The following form of a decree of separation is suited to the New York practice:

It is therefore ordered, adjudged and decreed that the plaintiff, A. B., the lawful wife of the defendant C. B., be and is hereby forever separated [or, separated until the further order of the court] from said defendant, his bed and board, upon the ground of extreme cruelty [or other cause]; provided, however, that the parties hereto may, at any time hereafter by their joint petition, apply to this court to have this judgment modified or discharged.

It is further ordered and adjudged that neither of said parties is at liberty to marry any other person during the life of the other party.

[*Add further provisions relating to alimony and custody of children.*]

**§ 765. Decree of nullity.**—The decree of nullity is similar in form to the decree of divorce, and should contain appropriate findings, and state the cause of annulment.

[*Title of cause.*]

This cause came on to be heard on this — day of —,

18—, upon the petition, answer and reply, and the evidence submitted by both parties in open court; on consideration whereof the court finds that the plaintiff has been a resident of the state of — for — years before the filing of her petition herein; that the parties were married as alleged in said petition; that at the time of said marriage the defendant had a wife living, and not divorced from said defendant.

The court further finds that the marriage of the parties in this action was contracted in good faith, and in the belief that the former wife was dead.

It is therefore ordered, adjudged and decreed that the marriage contract between said parties be and the same is hereby declared null and void, and of no force and effect; and the same is hereby set aside and annulled, and the said parties released from the obligations of the same.

And it is further decreed that the issue of said marriage, to wit, — —, born or begotten before the commencement of the action, are hereby declared legitimate, and entitled to succeed to the real and personal estate of their mother, — —, the plaintiff herein, as legitimate children.

And it is further ordered [*provision restoring wife's property.*].

**§ 766. Decree for permanent alimony.**—The decree for permanent alimony may be entered as a part of the decree granting divorce or separately. The following form may be added as a part of the decree of divorce:

It is furthered ordered that the defendant pay to the clerk of the court for the use of the plaintiff the sum of — dollars on the 1st day of —, 18—, and on the 1st day of —, 18— [semi-annually or quarterly], for the support and maintenance of the said plaintiff during her natural life or until she shall again marry; such sums not to be in lieu of her right of dower in the defendant's real estate or in lieu of her interest in the personal estate of said defendant in case of his death intestate.

It is further ordered that the defendant give security to the clerk of this court, to be approved by said clerk [*or, by this court,*], for the payment of said alimony, and the said allowance for the support of said children.

It is further ordered that in case the defendant fails to make the said payments as provided herein, the clerk of said court may, upon the request of the plaintiff, issue execution for the collection of payments then due.

And it is further ordered that in case of a change in the circumstances of either of the parties to this action, either of them may apply to this court for such modification of this decree as may seem just and equitable.

The following form may be used where the permanent alimony is declared to be a lien upon real estate and execution awarded:

"And it is further ordered, adjudged and decreed that defendant pay to plaintiff's attorney the sum of \$100 as counsel fees of plaintiff in this action; and that the said defendant pay to the clerk of this court, for the use of the plaintiff, as plaintiff's costs in this action taken, the sum of \$28.05; and that the said defendant pay to said plaintiff the sum of \$1,500 in full for all future alimony for the support of herself and her two minor children; and that said sum to be paid, amounting in the aggregate to the sum of \$1,628.05, be and the same is hereby declared a lien on the following described real property which is hereby declared to belong to the defendant: [*description of property.*] That all of said sums may be paid to the parties entitled thereto, or to the clerk of this court for their use, and if the same be not paid, and the receipts therefor filed with the said clerk within twenty days from the date of this decree, execution or order of sale of the said property may issue thereon, on demand of the plaintiff, under which execution or order of sale the said real property, or so much thereof as will satisfy plaintiff's demand, to wit, \$1,628.05, may be sold in the manner prescribed by law for the sale of real property under execution."<sup>1</sup>

The decree for permanent alimony may be secured by bond or mortgage upon real estate. In the following decree the securities are to be deposited with trustees:

"It is further adjudged that the plaintiff forthwith pay to the attorney for the defendant, for her as alimony, \$2,100, and to her, as further alimony, the further sum of \$200, on the 1st day of January, 1885, and the further sum of \$400 on the 1st day of July, 1885, and the like sum of \$400 on the first day of each and every six months from said 1st day of July, 1885.

<sup>1</sup> This decree was held valid in *Robinson v. Robinson*, 79 Cal. 511; *but* irregular because the attorney's fee was payable to the attorney instead of to the clerk for the use of the wife.

"It is further adjudged that, to secure the payment of said semi-annual allowance of alimony of \$400, Geo. Jess & Co., bankers of Waupun, Wis., are hereby constituted and appointed trustees, to take hold of the following securities, to wit: The plaintiff shall forthwith execute to said Geo. Jess & Co. a mortgage in trust on his homestead in the city of Waupun, Wis., and shall forthwith deposit with them, and keep on deposit with them, for the same purpose, at least \$6,000, face value, of good notes secured by good real-estate mortgages."<sup>1</sup>

This form of security will not be preferred to the decree which is declared a lien upon real estate, for, in case of a failure to pay the alimony as it becomes due, execution may be awarded; while in the case of alimony secured by mortgage, the wife may be compelled to foreclose her securities.

**§ 767. Decree awarding custody of children and use of homestead.**—The following decree was entered by the supreme court of Colorado in a contested case, and may be useful in similar cases:<sup>2</sup>

"It is now ordered, adjudged and decreed by the court that the defendant, Marion A. Luthe, shall, until further order of the court, retain the custody and control of the said children of the parties hereto, during their minority, to support, care for and educate them to the best advantage—the condition and circumstances of the plaintiff and defendant will allow.

"That for this purpose defendant shall have the possession of lot 25 and south half of lot 26, block 150, Adeas addition to the city of Denver, Arapahoe county, and state of Colorado, and the improvements thereon, to hold, occupy and enjoy the same, together with the issues, rents and profits thereof, without let, hindrance or interference in any manner on the part of the plaintiff. That plaintiff shall keep the dwelling-house situate on said premises well insured at his own expense, in some fire insurance company of good repute for financial responsibility. He shall pay the taxes thereon, and shall keep the interest paid up on the incumbrance of \$3,800 on said premises.

"And further, plaintiff shall pay or cause to be paid to defendant, within sixty days from the entry of this modi-

<sup>1</sup> Maxwell v. Sawyer (Wis.), 63 N. W. 283.      <sup>2</sup> Luthe v. Luthe, 12 Colo. 421, 2 L. P. 467.

fied decree, the sum of \$260 on account of the furniture taken by him from said defendant; and plaintiff shall also pay or cause to be paid to the defendant, on or before the 15th day of December of each and every year, the sum of \$50 for herself, and the sum of \$25 on account of each of said minor children then remaining in her custody and control as aforesaid.

"In case the plaintiff shall fail at any time to pay to defendant any of the sums of money hereinbefore specified, or any part thereof, when the same shall become due and payable, the amount so remaining unpaid shall constitute a lien in favor of defendant against plaintiff's undivided half interest in said lot 25, and south half of lot 26, aforesaid, and the same may be foreclosed by proper civil action.<sup>1</sup>

"Defendant may also at any time have execution, garnishment or other proper proceedings against plaintiff for any such sum or sums of money, or any part thereof, remaining due and unpaid according to the terms of this decree.

"In case the plaintiff shall fail to keep said dwelling-house insured as aforesaid, and any loss shall thereby befall said estate, such loss shall be a lien against his interest in said premises, and in favor of the defendant, and the amount of said lien may be established by a proper civil action, and foreclosed accordingly.

"If plaintiff shall suffer said premises, or any part thereof, to be sold for taxes or for default in payment of said incumbrance of \$3,800, or any part thereof, or any interest thereon, the loss or sacrifice on account of such sale or sales shall, as between the parties hereto, be borne wholly by the said plaintiff; and the defendant may become the purchaser at such sale or sales, or may redeem or repurchase said premises, or any part thereof, from such sale or sales, for the benefit of her individual or separate estate, the same as though she were not a tenant in common with plaintiff.

"The plaintiff may renew said incumbrance from time to time, as may be necessary, but not for a greater sum than \$3,800, nor at a rate of interest greater than ten per cent. per annum; and defendant shall join in the execution of any necessary securities thereof; and plaintiff shall not in any manner interfere with defendant's enjoyment of said premises, or any part thereof, for the purposes aforesaid, until the further order of the court.

"If plaintiff shall faithfully perform the matters required of him by this decree while said defendant shall have the custody of said children as aforesaid, his undivided half inter-

<sup>1</sup> *Luthe v. Luthe*, 12 Colo. 421, 21 P. 467.

est in said premises shall not be deemed to be otherwise affected hereby, and the same shall be preserved for his ultimate use and enjoyment; provided, nevertheless, that, if plaintiff shall elect so to do, he may convey to defendant by good and sufficient warranty deed, subject only to the incumbrance and liens hereinbefore mentioned, all his right, title and interest in and to the premises above described, so that defendant shall become the absolute owner of the whole thereof, subject only to said liens and incumbrance, with full authority to use, sell, convey, lease or incumber the same, as she shall deem for the best interest of herself and said minor children; and upon the execution and delivery of the conveyance aforesaid within twenty days from the entering of this decree, plaintiff shall be and stand relieved from each and every of the commands, directions and requirements hereinbefore expressed, touching the payment of interest, insurance, taxes and other allowances on account of alimony and maintenance for said defendant, remaining subject only to such obligations as may thereafter be devolved upon him in respect to his surviving children during the minority, in case of necessity or of a substantial change in the condition or circumstances of the parties thereto.

"This decree shall stand in lieu of all former decrees as to the custody of the children, use of realty, recovery of personality and alimony, and maintenance for defendant and said children. The former decree of this court, in reference to visits to and by the children, and the conduct of the parents in their intercourse with the children, shall be and remain in full force and effect, and shall be enforced by the court when either party shall, upon proper notice to the other, show that there has been a violation thereof. This decree may be further modified by the court upon due notice to the parties and opportunity to be heard, as the condition or circumstances of the parties may change, or as the best interests of the children may require."

**§ 768. Decree restraining sale of property and restoring wife's property and awarding use of homestead.—** After the usual decree of divorce, the following provision may be added to the decree where the wife prayed for the return of her property, the use of the homestead and a perpetual injunction against judgments against the husband alleged to be fraudulent:

"And it is further ordered and adjudged:

"That the said judgments, rendered as aforesaid in the

district court of —, —, in favor of said J. B. and J. U., be and they are hereby declared to be fraudulent and void.

“That said executions and levies constitute no lien on said premises; that said H. B., J. B. and J. U. be and they are hereby enjoined and restrained from collecting or attempting to collect said judgments, or from selling or attempting to sell said premises or any part thereof, or from mortgaging or in any way incumbering said property or any part thereof, without the assent of said plaintiff A. B.

“That said plaintiff has the right, conjointly with said defendant H. B., to the possession and occupancy of the following premises heretofore occupied as a homestead by the plaintiff and defendant, to wit: [*description of property.*]

“That plaintiff have the issues, rents and profits of the following described premises, and that she have the right to rent and control the same: [*description of property.*]

“That the defendant H. B. return to the plaintiff, and that she have as her separate and absolute property, all the household goods in the house of said homestead or belonging thereto. [*Description of personal property.*]

“That said defendants, H. B., J. B. and J. U., be, and they are hereby, enjoined and restrained from in any way interfering with said plaintiff in the peaceable possession of the said homestead premises, to wit: [*description of property,*] or in renting, controlling or receiving the issues, rents and profits of the said property.

“That plaintiff have and recover of and from defendant H. B. the sum of \$50 as her reasonable attorneys' fees herein, and that defendant H. B. pay the costs of this action, taxed (\$87.50).”<sup>1</sup>

<sup>1</sup> Affirmed in *Busenbark v. Busenbark*, 33 Kan. 572.

## EVIDENCE.

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§ 774. In general.	§ 782. Privileged communications between husband and wife.
775. Default.	783. Privileged communications to physicians and attorneys.
776. Depositions.	784. Testimony of children of the parties.
777. Proof of marriage.	785. Relatives and servants as witnesses.
778. Husband and wife as witnesses.	
779. Necessity of corroborating testimony of a party.	
780. What corroboration is sufficient.	
781. Confessions and admissions.	

**§ 774. In general.**—The suit for divorce is *sui generis*.<sup>1</sup> It is not a proceeding to punish crime,<sup>2</sup> but is a special proceeding in a court of equity, and therefore conforms to the chancery practice except in certain instances which are noted in this treatise in the treatment of various subjects. As it is a civil suit it is not governed by the rules of criminal procedure, and the matrimonial offense alleged as a cause for divorce need not be proved beyond a reasonable doubt.<sup>3</sup>

It is not necessary to repeat here the rules of evidence with reference to each cause for divorce, and each of the defenses to the suit for divorce. A reference to the sections in which the evidence of each cause for divorce has been noticed may be appropriate here.<sup>4</sup>

<sup>1</sup> See authorities cited in § 4.

<sup>2</sup> § 6.

<sup>3</sup> Thus, adultery is both a cause for divorce and a statutory crime, but adultery need not be proved beyond a reasonable doubt. See

Adultery, § 142. For sufficiency of evidence of adultery, see § 140.

That circumstances must be incompatible with innocence, see § 141. Whether the fact of adultery must be a necessary conclusion from the evidence, § 143. Proof of intent, see §§ 163–176.

<sup>4</sup> Desertion, §§ 102–110. Adultery, §§ 140–162. Evidence of in-

In suits for divorce the court may vary the order of the introduction of the testimony, and rulings in this regard will not be held erroneous unless there has been an abuse of discretion manifestly prejudicial to the complaining party. The following is suggested as the convenient and logical order of the evidence in the suit for divorce, as it follows in the order of the usual allegations of the petition:

1. Proof of the required residence in the state.<sup>1</sup>
2. Proof of marriage of the parties.<sup>2</sup>
3. Proof of the cause for divorce.<sup>3</sup>
4. Proof of the allegations concerning alimony and division of the property and the custody of the children.<sup>4</sup> In a contested suit for divorce questions relating to alimony cannot be tried with the issues relating to the causes for divorce without confusion, especially where there is a trial by jury. In such cases the court may hear the evidence relating to the cause for divorce, and a decree of divorce may be entered reserving the question of alimony for further consideration.

**§ 775. Default.**—When a case is heard upon default the court should protect the interest of the public and of the defendant by requiring strict proof, not only of the cause for divorce, but of all facts required by the statute, such as residence, good faith and the good conduct of the complainant.<sup>5</sup> The fact that the defendant has not appeared or answered does not supersede the necessity of proof of every fact necessary to entitle the plaintiff to the relief demanded.<sup>6</sup>

tent, §§ 163–176. Witnesses in adultery cases, §§ 190, 201. Cruelty, §§ 338–342. Habitual drunkenness, § 358. Recrimination, § 443. Condonation, §§ 463–468. Connivance, §§ 488, 489. Collusion, § 510. Presumptions in favor of marriage, § 580.

<sup>1</sup> For proof of residence or domicile, see Domicile, §§ 40–48.

<sup>2</sup> See § 777.

<sup>3</sup> See references *supra*.

<sup>4</sup> Temporary alimony, §§ 850–863.

Permanent alimony, §§ 900–917. Custody and support of children, §§ 975–985.

<sup>5</sup> *Reed v. Reed*, 39 Mo. Ap. 473; *Suesemilch v. Suesemilch*, 43 Ill. Ap. 593.

<sup>6</sup> *Phelan v. Phelan*, 12 Fla. 449; *Barry v. Barry*, 1 Hopkins Ch. 118; *Scott v. Scott*, 17 Ind. 309; *Robinson v. Robinson*, 16 Mich. 79; *Hanks v. Hanks*, 3 Edw. Ch. 469; *Latham v. Latham*, 30 Gratt. 307; *Palmer v. Palmer*, 1 Paige, 276; *Lewis v.*

The decree by default need not recite that a hearing was had or that the evidence was sufficient.<sup>1</sup> The court should be satisfied before hearing the proofs that it has jurisdiction to render a decree. Care in this respect may prevent many of the complications that disturb titles and render second marriages void.<sup>2</sup> The default should be set aside in all cases where there is any showing of a defense, although the defendant may have been guilty of laches that might preclude her in ordinary cases.<sup>3</sup> The court has a wide discretion in actions for divorce, and will exercise its power in setting aside a default in any case where it is probable that the decree should be modified or vacated.<sup>4</sup> In California it is held that no showing of a defense need be made.<sup>5</sup> But it seems absurd that a court should act in the matter unless the necessity of a new trial is made to appear.<sup>6</sup> If a showing is made the issue should be tried, for the law favors trials upon the merits, especially in divorce suits, where the interests of the state demand that all the facts be adduced, and that no divorce be granted except for adequate causes and where no valid defenses exist.<sup>7</sup> Where such showing is made or an answer tendered, it is manifest that a hearing should be granted, and that the merits of the application should not be determined by counter-affidavits.<sup>8</sup> When the default is set aside the case is tried in the usual manner.<sup>9</sup> The fact that plaintiff has married after the decree was entered will not deprive the defendant from having the de-

Lewis, 9 Ind. 105; *Welch v. Welch*, 16 Ark. 527; *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

<sup>1</sup> *Young v. Young* (Tex. Civ. Ap.), 23 S. W. 83.

<sup>2</sup> See *Pinckney v. Pinckney*, 4 Ia. 324.

<sup>3</sup> *Smith v. Smith*, 20 Mo. 166; *Brown v. Brown*, 59 Ill. 315; *Bowan v. Bowan*, 64<sup>4</sup> Ill. 75; *Mumford v. Mumford*, 13 R. L. 19.

<sup>4</sup> *Simpkins v. Simpkins*, 14 Mont. 386, 36 P. 759.

<sup>5</sup> *McBlain v. McBlain*, 77 Cal. 507, 20 P. 61; *Wadsworth v. Wadsworth*, 81 Cal. 182, 22 P. 648; *Cottrell v. Cottrell*, 83 Cal. 457, 23 P. 531.

<sup>6</sup> *Blank v. Blank*, 107 N. Y. 91, 13 N. E. 615.

<sup>7</sup> See *contra*, *Savage v. Savage*, 10 Or. 331.

<sup>8</sup> *Thelin v. Thelin*, 8 Ill. Ap. 421.

<sup>9</sup> *Chase v. Chase*, 19 N. Y. Supp.

fault set aside.<sup>1</sup> Where the wife enters an appearance and moves to set aside the default because the return of the sheriff is false and she had no notice of the suit, and tenders an answer to the plaintiff's petition, the default will be set aside after a period of six months, although the statute provides that the court has control over its decrees of divorce for six months after entry.<sup>2</sup> In some states the courts are prevented by statute from vacating decrees of divorce after the term in which they are rendered.<sup>3</sup>

**§ 776. Depositions.**—Unless there is some provision of the statute to the contrary, depositions are admissible as in other cases. The right to introduce such testimony is conferred by statute, and does not exist at common law. The general provision of the statute authorizing and regulating the taking of depositions in all civil cases is broad enough to include suits for divorce.<sup>4</sup> The rules of the chancery practice are followed in some states.<sup>5</sup> The reports do not throw much light upon the method of taking depositions, and the practitioner must consult the statutes of his own state and local rules of practice.

**§ 777. Proof of marriage.**—In every action for divorce the marriage must be proved. If there was no marriage, there can be no breach of marital duties, and no relation to suspend or dissolve. To some extent a decree of divorce affirms the marriage and then decrees that such relation is dissolved. Such decree is in some instances competent evidence of the marriage.<sup>6</sup> Where there is a valid prior marriage undissolved, the fact that one party to a subsequent marriage has obtained a decree of divorce will in no way

<sup>1</sup> *Scripture v. Scripture*, 70 Hun, 432, 24 N. Y. Supp. 301; *Simpkins v. Simpkins*, 14 Mont. 386, 36 P. 759.

<sup>2</sup> *Locke v. Locke* (R. I.), 30 A. 422.

<sup>3</sup> See on this point cases cited in § 1050. When default vacated where the service is constructive, see § 825. When decree vacated on account of fraud, §§ 1050-1057.

<sup>4</sup> *Lattier v. Lattier*, 5 Ohio, 538; *Anonymous*, 1 Yeates, 404; *Page v. Page*, 51 Mich. 88; *Looker v. Looker*, 46 Mich. 68.

<sup>5</sup> See authorities cited in *Flavell v. Flavell*, 20 N. J. Eq. 211.

<sup>6</sup> *Holbrook v. S.*, 34 Ark. 511; *Moore v. Hegeman*, 92 N. Y. 521.

affect the validity of the second marriage.<sup>1</sup> The party to the first marriage is not bound by a decree of divorce dissolving the subsequent marriage, and no inference should be drawn from such decree. The admission of the parties that they are husband and wife is not sufficient proof of the marriage.<sup>2</sup> But where there is such admission in the pleadings, mere proof of long cohabitation and repute is sufficient.<sup>3</sup> If the marriage is denied, the issue thus raised should be first determined before any evidence is heard tending to prove a cause for divorce. If there is no marriage the action may be dismissed.<sup>4</sup> But the interest of the state requires that the alleged marriage be declared null in the same action. Generally, when the marriage is denied, the defendant asks for such relief.<sup>5</sup> A marriage is presumed valid if it is shown to have been duly solemnized and consummated.<sup>6</sup> If the validity of a marriage is affected by a decree of divorce, such decree must be proved by the party alleging it.<sup>7</sup>

The marriage may be established in actions for divorce as in other actions. It may be proved by witnesses who were present when the marriage took place, and who testify that the marriage was celebrated according to the usual form, although they cannot state the words used.<sup>8</sup> The testimony of eye-witnesses is sometimes regarded as the best evidence, and admissible without proof that other evidence cannot be produced.<sup>9</sup> In some states the marriage may be established

<sup>1</sup> *Williams v. Williams*, 46 Wis. 464; *Williams v. Williams*, 63 Wis. 58; *Pearce v. Pearce* (Ky.), 16 S. W. 271. <sup>2</sup> *Finn v. Finn*, 62 How. Pr. 83.

<sup>3</sup> *Schmidt v. Schmidt*, 29 N. J. Eq. 496; *Williams v. Williams*, 3 Me. 135; *Zule v. Zule*, 1 N. J. Eq. 96. See, *contra*, *Fox v. Fox*, 25 Cal. 587; *Harman v. Harman*, 16 Ill. 85.

<sup>4</sup> *Morris v. Morris*, 20 Ala. 168.

<sup>5</sup> *Mangue v. Mangue*, 1 Mass. 240; *Simons v. Simons*, 13 Tex. 468;

<sup>6</sup> *Davis v. Davis*, 1 Abb. N. C. (N. Y.) 140; *Blinks v. Blinks*, 5 Misc. Rep. 193, 25 N. Y. Supp. 768.

<sup>7</sup> *Harris v. Harris*, 8 Ill. Ap. 57.

<sup>8</sup> *Donahue v. Donahue*, 17 Ill. Ap. 578; *Dare v. Dare* (N. J.), 27 A. 654.

<sup>9</sup> *Kope v. P.*, 48 Mich. 41; *P. v. Calder*, 30 Mich. 85; *Fleming v. P.*, 27 N. Y. 329; *Lord v. S.*, 17 Neb. 526; *McQuade v. Hatch*, 65 Vt. 482.

<sup>9</sup> *Chew v. S.* (Tex.), 5 S. W. 373;

by the testimony of one of the spouses.<sup>1</sup> Marriage certificates are admissible if proved to have been kept in proper custody or by the person asserting the marriage.<sup>2</sup> It is admissible without proof of its genuineness or the official capacity of the person who performed the ceremony.<sup>3</sup> The contents of the certificate, if lost, may be proved by a witness who can state in substance what it contained.<sup>4</sup> Before a certified copy of a marriage record is admissible it must appear that such record was required to be kept by some officer pursuant to some statute.<sup>5</sup> When the marriage is to be proved by a certificate of a justice of the peace of another state, it must be established by other evidence that the signature is genuine, and that he had authority to solemnize marriage at the time and place.<sup>6</sup> A marriage may be proved by the original license if issued by proper authority, and by the indorsement of the officer that he performed the ceremony at a certain time and place, together with satisfactory evidence that the parties cohabited as man and wife, and were reputed to be such.<sup>7</sup> The identity of the parties with those named in the record will be presumed from the identity of name.<sup>8</sup> In actions for divorce the marriage may be proved by cohabitation and repute<sup>9</sup> or by

*S. v. Marvin*, 35 N. H. 22; *Warner v. Com.*, 2 Va. Cases, 95; *Baughman v. Baughman*, 29 Kan. 283.

<sup>1</sup> *Miles v. United States*, 103 U. S. 304; *Van Tuyl v. Van Tuyl*, 57 Barb. 235; *Woodrich v. Freeman*, 71 N. Y. 601; *Brown v. Brown*, 142 Ill. 409; *P. v. Bartholf*, 24 Hun, 272; *S. v. Bowe*, 61 Me. 171.

<sup>2</sup> *Gaines v. Green Pond Iron Co.*, 32 N. J. Eq. 86; *Gaines v. Relf*, 12 How. (U. S.) 472.

<sup>3</sup> *Camden v. Belgrade*, 78 Me. 204, 3 A. 652. See *contra*, *Com. v. Morris*, 1 Cush. 391.

<sup>4</sup> *Camden v. Belgrade*, 78 Me. 204, 3 A. 652.

<sup>5</sup> *Tucker v. P.*, 122 Ill. 588; *Mor-*

*risey v. Wiggins Ferry Co.*, 47 Mo. 521; *Hutchins v. Kimmell*, 31 Mich. 126; *Niles v. Sprague*, 13 Ia. 198; *Succession of Taylor*, 15 La. An. 313; *Stanglein v. S.*, 17 O. St. 453; *Bradford v. Bradford*, 51 N. Y. 669; *Abbott v. Abbott*, 4 Swab. & T. 254; *Degnan v. Degnan*, 17 N. Y. Supp. 883; *Verhalf v. Houwenlengen*, 21 Ia. 429.

<sup>6</sup> *S. v. Horn*, 43 Vt. 20.

<sup>7</sup> *Glaser v. Dambman* (Md.), 32 A. 522.

<sup>8</sup> *Jackson v. King*, 5 Cow. 237. See *contra*, *Wedgwood's Case*, 8 Greenl. 75.

<sup>9</sup> *Bowman v. Bowman*, 24 Ill. Ap. 165; *White v. White*, 82 Cal. 427,

other circumstantial evidence.<sup>1</sup> But the presumption which arises from cohabitation and repute may be overcome by any competent evidence.<sup>2</sup> It may be shown that such cohabitation was of meretricious origin, and then a marriage will not be presumed.<sup>3</sup> The fact of marriage may be proven by a marriage contract purporting to have been signed by the parties.<sup>4</sup>

**§ 778. Husband and wife as witnesses.**—Under the common law neither husband nor wife could be witnesses in a suit for divorce, because they were both parties and interested in the event of the suit; and also because they could not testify for or against each other. And at the present time both parties are incompetent as witnesses, unless the statutes permit them to testify.<sup>5</sup> The fact that the statute confers the right to obtain a divorce for certain causes does not necessarily make the parties competent witnesses.<sup>6</sup> The reason of the common law seems to have been that the husband and wife could not testify for each other, “because their interests were identical;” nor against each other, because it was against public policy to allow them to do so for fear of creating dissent and distrust between them. The

<sup>1</sup> 23 P. 276; *Finn v. Finn*, 12 Hun (N. Y.), 339; *Vreeland v. Vreeland*, 18 N. J. Eq. 43; *Houpt v. Houpt*, 5 O. 539; *Wright v. Wright*, 6 Tex. 3; *Mitchell v. Mitchell*, 11 Vt. 134; *Hitchcox v. Hitchcox*, 2 W. Va. 435; *Trimble v. Trimble*, 2 Ind. 76; *Jones v. Jones*, 48 Md. 391; *Barnum v. Barnum*, 42 Md. 251; *Borton v. Borton*, 48 Ia. 697; *Kilburn v. Kilburn*, 89 Cal. 46, 26 P. 636; *Cross v. Cross*, 55 Mich. 280; *Clancey v. Clancey*, 66 Mich. 202; *Peet v. Peet*, 52 Mich. 464.

<sup>2</sup> *Hamilton, In re*, 76 Hun, 200, 27 N. Y. Supp. 813.

<sup>3</sup> *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Port v. Port*, 70 Ill. 484; *Jones v. Jones*, 45 Md. 144; *Haynes*

<sup>4</sup> *McDermott*, 91 N. Y. 451; *Bothick v. Bothick*, 45 La. Ann. 1382, 14 So. 293.

<sup>5</sup> *Hunt's Appeal*, 86 Pa. 294; *Harbeck v. Harbeck*, 102 N. Y. 714, affirming 31 Hun, 640; *Badger v. Badger*, 88 N. Y. 546; *Brinkley v. Brinkley*, 50 N. Y. 184; *Van Dusan v. Van Dusan*, 97 Mich. 70; *Ahlberg v. Ahlberg*, 24 N. Y. Supp. 919.

<sup>6</sup> *Bates v. Bates*, 7 Misc. Rep. 547; *State v. Behrman* (N. C.), 19 S. E. 220; *Sharon v. Terry*, 36 Fed. 337; *Sharon v. Sharon*, 67 Cal. 185; s. c., 79 Cal. 633; 84 Cal. 424.

<sup>5</sup> *Anonymous*, 58 Miss. 15; *Cornish v. Cornish*, 56 Tex. 564.

<sup>6</sup> *Ayers v. Ayers*, 28 Mo. Ap. 97.

fact that the parties are living in separation, and their mutual confidence has already been destroyed by other causes, does not render the parties competent as witnesses against each other.<sup>1</sup> Although it would seem that, where the parties are thus estranged, the reason of the common-law rule would not obtain. Generally the parties are made competent witnesses in all cases by some general statute or provision of the code. These general provisions may be so broad as to include actions for divorce.<sup>2</sup> Where the statute permits the parties to testify in all cases except in any "action for divorce on account of adultery," the parties may testify in a suit for divorce on account of the wife's impotence.<sup>3</sup>

But there are some general statutes not quite broad enough to include actions for divorce. Thus the statute in the District of Columbia made all parties and interested persons competent to testify, and provided that: "Nothing in the preceding section shall render . . . a husband competent or compellable to give evidence for or against his wife, or a wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery. Nor shall a husband be compellable to disclose any communication made to him by his wife during marriage; nor shall a wife be compellable to disclose any communication made to her by her husband during marriage." It was held that this, if taken literally, would make the parties to a divorce suit competent to testify, but the subsequent provisions of the section indicated a contrary intention.<sup>4</sup> The husband and wife are not rendered competent by a general statute permitting persons to testify, although "interested in the event of the suit as parties or otherwise," because the common-law disqualification of husband and wife is based upon other considerations than in-

<sup>1</sup> *Dwelly v. Dwelly*, 46 Me. 377.

<sup>3</sup> *Barringer v. Barringer*, 69 N. C.

<sup>2</sup> *Stebbins v. Anthony*, 5 Colo. 179.

348; *Berlin v. Berlin*, 52 Mo. 151; <sup>4</sup> *Burdette v. Burdette*, 6 Mackey, *Darrier v. Darrier*, 58 Mo. 222. 469.

terest in the event.<sup>1</sup> A provision that the husband and wife shall not be incompetent to testify except as to "confidential communications between them" is not clear and explicit enough to change the common law and render the parties competent witnesses in divorce suits.<sup>2</sup> The fact that a defendant may be required to answer the complaint under oath has been regarded as ground for excluding the testimony of the parties.<sup>3</sup> Although the statute may permit the parties to testify as in other cases, this will not permit the wife to prove non-access of her husband. The incompetency of such evidence rests not upon the marital relation alone, but upon the ground of public policy and morality.<sup>4</sup> In some states the party is not competent to testify in actions for divorce on account of adultery except to prove or disprove the marriage and residence within the state.<sup>5</sup>

The rule excluding the testimony of the parties is especially harsh and dangerous to justice in suits for divorce, because it prevents the defendant from explaining the circumstances and detailing facts which would otherwise prevent a decree. Marital wrongs are, in the nature of the case, generally committed before few witnesses, or while the parties are alone, and it will often amount to a denial of justice if the parties cannot relate their version of the affair. Modern legislation has, to some extent, remedied this defect in the law.<sup>6</sup> Although the statute has made the husband

<sup>1</sup> *Dwelly v. Dwelly*, 46 Me. 377; *Haley v. Haley*, 67 Cal. 24; *Kean v. Spofford v. Spofford*, 41 Tex. 111; *Kean*, 7 D. C. 4; *Shafto v. Shafto*, 24 Vt. 649; *Corson v. Corson*, 44 N. H. 587.

<sup>2</sup> *Cornish v. Cornish*, 56 Tex. 564.

<sup>3</sup> *Morse v. Morse*, 25 Ind. 156.

<sup>4</sup> *Corson v. Corson*, 44 N. H. 587. See, also, statutes not permitting the parties to testify. *Dillon v. Dillon*, 32 La. An. 643; *Daspit v. Ehringer*, 32 La. An. 1174. Statutes permitting such testimony. *Matthai v. Matthai*, 49 Cal. 90; *Melvin v. Melvin*, 58 N. H. 569;

<sup>5</sup> *Doughty v. Doughty*, 32 N. J.

<sup>6</sup> Eq. 32; *Franz v. Franz*, 32 N. J. Eq.

483; *Wells v. Wells*, 32 N. J. Eq. 4;

*Marsh v. Marsh*, 29 N. J. Eq. 196;

*Woolfolk v. Woolfolk*, 53 Ga. 661;

*Roe v. Roe*, 8 J. & S. 1; *Finn v. Finn*, 12 Hun, 339; *Moore v. Moore*,

14 Wk. Dig. 255; *Bailey v. Bailey*,

41 Hun, 424; *Fanning v. Fanning*,

20 N. Y. Supp. 849, 2 Misc. Rep. 90.

<sup>6</sup> In New York the defendant is

and wife competent witnesses in an action for divorce, a decree should rarely be granted without some corroborative evidence. And where the defendant denies and contradicts all the plaintiff's testimony it is clear that no case is established. Still there may be instances where the credibility of the parties is so unequal or the denial so inconsistent that a finding or verdict in favor of the plaintiff may be justified.<sup>1</sup>

**§ 779. Necessity of corroborating testimony of a party.** When the testimony of a party is admissible it is regarded as of no greater force than the testimony of an accomplice, and corroboration is generally required.<sup>2</sup> But corroboration

permitted by recent amendment of the code to testify to any fact disproving the adultery. *Irsch v. Irsch*, 12 Civil Proc. 181; *Stevens v. Stevens*, 54 Hun, 490, 8 N. Y. Supp. 47; *De Meli v. De Meli*, 120 N. Y. 485, approving 67 How. Pr. 20; *Steffens v. Steffens*, 11 N. Y. Supp. 424. The communications of husband and wife are admissible in an action for divorce for adultery although there is also an issue of cruelty to be tried in the same suit. Testimony competent on either issue must be admitted. *De Meli v. De Meli*, 120 N. Y. 485, 24 N. E. 996; *Woodrick v. Woodrick*, 141 N. Y. 457, 36 N. E. 395, affirming 20 N. Y. Supp. 468; *McCarthy v. McCarthy* (N. Y.), 38 N. E. 288. As to competency of the parties as witnesses see also the following cases: *Castello v. Castello*, 41 Ga. 613; *Cook v. Cook*, 46 Ga. 308; *Lorenz v. Lorenz*, 93 Ill. 376; *Wilcox v. Wilcox*, 16 Ill. Ap. 580; *Morse v. Morse*, 65 Ind. 156; *Stuart v. Stuart*, 47 Mich. 566; *Belton v. Belton*, 29 N. J. Eq. 449; *Pullen v. Pullen*, 2 Stew. Ch. 541; *Rivenburgh v.*

*Rivenburgh*, 47 Barb. 419; *Bissel v. Bissel*, 55 Barb. 325; *Hennessy v. Hennessy*, 58 How. Pr. 304; *Roe v. Roe*, 40 N. Y. Supr. 1; *Chamberlain v. P.*, 23 N. Y. 85; *Perkins v. Perkins*, 88 N. C. 41; *Winter v. Winter*, 7 Phila. 369; *Bronson v. Bronson*, 8 Phila. 261; *Pyle v. Pyle*, 10 Phila. 58; *Stafford v. Stafford*, 41 Tex. 111; *Hays v. Hays*, 19 Wis. 197; *Hill v. Proctor*, 10 W. Va. 59; *Rose v. Brown*, 11 W. Va. 122.

<sup>1</sup> Where a husband contradicted the wife's testimony in every particular, it was said that, the law having made the parties competent witnesses, it was for the jury and not the court to determine their credibility. "That she was flatly contradicted by her husband did not take the case away from the jury is clear. It may be that the credibility of the wife, and the want of credibility of the husband, were as clear to the minds of the jury as the light of noonday." *Flattery v. Flattery*, 88 Pa. 27.

<sup>2</sup> *Harris v. Harris*, 2 P. & M. 77; *Scott v. Scott*, 3 Swab. & T. 319; *Shafto v. Shafto*, 28 N. J. Eq. 34.

is not required by any absolute rule of law. Marital wrongs often occur when no witnesses are present, or the circumstances of the case are such that corroboration is impossible, and then a decree may be based on the testimony of one party alone.<sup>1</sup> Thus, in an action to annul a marriage on account of impotence, the wife's testimony was held sufficient. "No one," said the judge, "can help feeling that the single oath of a party interested, fortified by nothing stronger than the silence of the party charged, is treacherous ground for judicial decision; but no one can deny that if the lady's story is true, her condition is one of grievous hardship. And to call for corroboration, where all corroboration is from the nature of the subject impossible, would be harder still. I have no alternative, then, but to examine and adjudicate upon the petitioner's truth, or to close the door of the court against her altogether, be her story never so true. I accept the former, and pronounce myself entirely satisfied that this marriage has never been consummated, and that the respondent is incurably impotent."<sup>2</sup> The rule requiring the plaintiff's testimony to be corroborated is held to be merely a general rule of practice and not an inflexible rule of law. "When other evidence can be had," says Gray, J., "it is not ordinarily safe or fit to rely on the testimony of the party only. But sometimes no other evidence exists or can be obtained. The parties are made competent witnesses by statute, and there is no law to permit the finding of a fact upon the testimony of a party whose credibility and good faith are satisfactorily established."<sup>3</sup> And this is believed to be the law in all our states where the statute permits the parties to testify, and does not prohibit the courts from granting a decree upon the uncorroborated testimony of one party.<sup>4</sup> If both parties testify and the defendant denies all the plaintiff's testimony, the evidence is insufficient.<sup>5</sup> In

<sup>1</sup> *H. v. P.*, 2 P. & M. 126.

<sup>4</sup> *Sylvis v. Sylvis*, 11 Colo. 319, 17

<sup>2</sup> *F. v. D.*, 4 Swab. & T. 86.

P. 912.

<sup>3</sup> *Robbins v. Robbins*, 100 Mass. 150.

<sup>5</sup> *Fischer v. Fischer*, 18 N. J. Eq. 300.

such case, however, the court must be careful to notice the character of both parties and the consistency of the testimony, and may refuse the decree if the evidence is not satisfactory. In New Jersey and Arkansas, and perhaps other states, the courts have required corroborative evidence for so long a time that the rule has acquired almost the effect of a statute.<sup>1</sup>

It is provided in some of the states that no divorce shall be granted upon the uncorroborated statement, admissions or testimony of the parties.<sup>2</sup>

**§ 780. What corroboration is sufficient.**—The amount of corroboration that will suffice must depend upon the facts and circumstances of each particular case, and no general rule can be derived from the authorities. It is, however, conceded that the corroboration need not, standing alone, be sufficient to make out a *prima facie* case.<sup>3</sup> By some authorities it is held that the testimony of an accomplice is sufficiently corroborated by other evidence sustaining any material fact in the case;<sup>4</sup> while the greater weight of judicial opinion seems to be that the confirmatory evidence must tend in some degree to connect the prisoner with the crime, and not merely establish some collateral matter or prove

<sup>1</sup> Woodworth *v.* Woodworth, 21 N. J. Eq. 251; Sandford *v.* Sandford, 32 N. J. Eq. 420; Franz *v.* Franz, 32 N. J. Eq. 483; Doughty *v.* Doughty, 32 N. J. Eq. 32; McShane *v.* McShane, 45 N. J. Eq. 341, 19 A. 465; Palmer *v.* Palmer, 22 N. J. Eq. 88; Tate *v.* Tate, 26 N. J. Eq. 55; Costill *v.* Costill, 47 N. J. Eq. 346; Herold *v.* Herold, 47 N. J. Eq. 210, 20 A. 375, and cases cited; Rie *v.* Rie, 34 Ark. 37; Brown *v.* Brown, 38 Ark. 324; Scarborough *v.* Scarborough, 54 Ark. 20, 14 S. W. 1098; Kurtz *v.* Kurtz, 38 Ark. 119; Ortman *v.* Ortman, 92 Mich. 172, 52 N. W. 619.

39 N. W. 270; Lewis *v.* Lewis, 75 Ia. 200, 39 N. W. 271; Evans *v.* Evans, 41 Cal. 103; Matthai *v.* Matthai, 49 Cal. 90; Cooper *v.* Cooper, 88 Cal. 45, 25 P. 1062; Hagle *v.* Hagle, 74 Cal. 608, 16 P. 518; Leach *v.* Leach, 46 Kan. 724, 27 P. 131; McCulloch *v.* McCulloch, 8 Blackf. 60; Mathews *v.* Mathews, 41 Tex. 331.

<sup>2</sup> Rapalje on Witnesses, § 227, citing Lumpkin *v.* S., 68 Ala. 56; Hoyle *v.* S., 4 Tex. Ap. 239; S. *v.* Lawler, 28 Minn. 216; Jackson *v.* S., 4 Tex. Ap. 293.

<sup>4</sup> S. *v.* Hennessy, 55 Ia. 299; Territory *v.* Corbett, 3 Mont. 50.

<sup>2</sup> See Potter *v.* Potter, 75 Ia. 211,

that a crime has been committed by some one.<sup>1</sup> There is no doubt that circumstantial evidence which establishes a material fact in the case is sufficient corroboration of the plaintiff's testimony in an action for divorce.<sup>2</sup> When no divorce could be granted upon the testimony of either party "unless corroborated by other evidence," it was held that the wife's testimony that her husband committed adultery with a certain woman was sufficiently corroborated by evidence that the woman was of doubtful character and had lived alone with the defendant for some time, and also by the failure of the defendant to contradict her testimony, both the defendant and the alleged paramour being present at the trial.<sup>3</sup> The plaintiff's testimony that her husband had called her vile and opprobrious names was sufficiently corroborated by the testimony of a witness that the husband, when informed that his wife had complained to others of his ill treatment, did not deny the charges made against him.<sup>4</sup> Where there was no direct evidence aside from the testimony of the plaintiff that her husband became an habitual drunkard after marriage, her testimony was sufficiently corroborated by other facts in the case, detailed by other witnesses, tending to show that the drinking did not become habitual until after marriage and that the fits of intoxication became more frequent in later years.<sup>5</sup>

**§ 781. Confessions and admissions.**—The confessions and admissions of a party are admissible against him in a divorce suit as in other actions.<sup>6</sup> Such evidence is, however, of the

<sup>1</sup> Rapalje on Witnesses, citing *Com. v. Drake*, 124 Mass. 21; *S. v. Kellerman*, 14 Kan. 135; *Marler v. S.*, 67 Ala. 55; *P. v. Garnett*, 29 Cal. 622; *P. v. Ames*, 39 Cal. 403; *P. v. Cloonan*, 50 Cal. 449; *P. v. Courtney*, 28 Hun (N. Y.), 589.

<sup>2</sup> *Emerson v. Emerson*, 16 N. Y. Supp. 793; *Derby v. Derby*, 21 N. J. Eq. 36; *Venzke v. Venzke*, 94 Cal. 225, 29 P. 449; *Lewis v. Lewis*, 75 Ia. 200, 39 N. W. 271.

<sup>3</sup> *Evans v. Evans*, 41 Cal. 103.

<sup>4</sup> *Venzke v. Venzke*, 94 Cal. 225, 29 P. 443.

<sup>5</sup> *Lewis v. Lewis*, 75 Ia. 200, 39 N. W. 271.

<sup>6</sup> *King v. King*, 28 Ala. 315; *Handberry v. Handberry*, 29 Ala. 719; *Lindsay v. Lindsay*, 42 N. J. Eq. 150, 7 A. 666; *Burk v. Burk*, 44 Kan. 307, 24 P. 466; *Breckmans v. Breckmans*, 16 N. J. Eq. 123; *Richardson v. Richardson*, 50 Vt. 119; *Betts v.*

very lowest order, and from the earliest times to the present has been received with caution, and held insufficient to justify a decree of divorce.<sup>1</sup> The statutes sometimes prohibit the courts from granting divorce on such evidence.<sup>2</sup>

So the admissions of the parties in their pleadings do not relieve them from establishing all the facts necessary to pro-

Betts, 1 Johns. Ch. 197; Armstrong *v.* Armstrong, 32 Miss. 279; White *v.* White, 45 N. H. 121; Clutch *v.* Clutch, 1 N. J. Eq. 474; Lyster *v.* Lyster, 1 Ia. 130; Fulton *v.* Fulton, 36 Miss. 517; Lyon *v.* Lyon, 62 Barb. (N. Y.) 138; Devanbaugh *v.* Devanbaugh, 5 Paige, 554.

<sup>1</sup> See Summerbell *v.* Summerbell, 37 N. J. Eq. 603, reviewing the following early authorities: Williams *v.* Williams, 1 Hagg. Con. 299; Mortimer *v.* Mortimer, 2 Hagg. 310; Harris *v.* Harris, 2 Hagg. 376; Burgess *v.* Burgess, 2 Hagg. 223; Noverre *v.* Noverre, 1 Rob. 428; Owen *v.* Owen, 4 Hagg. 361; Grant *v.* Grant, 2 Curties, 16; Deane *v.* Deane, 12 Jur. 63. The rule is deduced from the above that, if the proofs are almost sufficient, but do not entirely satisfy the conscience of the court, the confession may be decisive if free from suspicion of collusion, improper influence, or made in good faith. See, also, as supporting the text, Miller *v.* Miller, 1 N. J. Eq. 386; Baxter *v.* Baxter, 1 Mass. 346; Sawyer *v.* Sawyer, Walker (Mich.), 48; Jones *v.* Jones, 17 N. J. Eq. 351; Latham *v.* Latham, 39 Gratt. (Va.) 307; Williams *v.* Williams, 1 P. & M. 29; Le Brun *v.* Le Brun, 55 Md. 495; Mack *v.* Handy, 39 La. An. 491, 2 So. 181; Vance *v.* Vance, 8 Me. 132; Johns *v.* Johns, 29 Ga. 718; Ed-

wards *v.* Edwards, 3 Pitts. 333; Van Weighten *v.* Van Weighten, 4 Johns. Ch. 501.

<sup>2</sup> Kean *v.* Kean, 7 Dist. C. 4; Woodrick *v.* Woodrick, 20 N. Y. Supp. 468; Marshall *v.* Baynes, 80 Va. 1040, 14 S. E. 978; Burk *v.* Burk, 44 Kan. 307, 24 P. 466; Steffens *v.* Steffens, 11 N. Y. Supp. 425; Fowler *v.* Fowler, 11 N. Y. Supp. 419.

Where a witness has testified that the husband had invited the paramour to the house, another witness may be asked, on cross-examination, if "she did not hear the plaintiff before that forbid (the wife) to go with (the paramour) or go where he was." Such testimony is not incompetent under the statute excluding the declarations and admissions of the parties, and is admissible to disprove connivance. Toole *v.* Toole, 109 N. C. 615. Such conversation, having taken place in the presence of the witness, is not a privileged communication. Toole *v.* Toole, 112 N. C. 152. The declarations of the alleged paramour, made to or in the presence of the wife, and the reply of the wife, tending to show that improper familiarities had been or were about to be indulged in by the parties, is not incompetent as a confession or admission of a party to the suit. Toole *v.* Toole, 112 N. C. 152.

cure the divorce.<sup>1</sup> The admission of defendant's counsel that plaintiff is a resident of the state does not excuse proof of that fact where the statute requires such fact to be proved by at least two witnesses.<sup>2</sup> The reason for requiring additional evidence is to prevent divorce by collusive agreements, and because the confession may have been obtained by extortion or fraud.<sup>3</sup> Some authorities maintain that a decree can be based upon the confession of the defendant, "where it is full, confidential, reluctant and free from suspicion of collusion,"<sup>4</sup> or the circumstances were such as to repel all just suspicion.<sup>5</sup> But the general doctrine already stated requires something more than mere proof of the genuineness of the confession; it requires proof that the confession itself must be true. This does not require the additional proof to be sufficient to establish a *prima facie* case.<sup>6</sup> If the confession is consistent and genuine and corroborated by other evidence, it is entitled to great weight, and becomes the foundation of other evidence which may be explanatory.<sup>7</sup> Or, if it is inconsistent and improbable, it will not be regarded as of any value. The confession to be admissible must be voluntary. If it has been obtained by unfair means, by fraudulent representations, by fear of violence or disgrace, or through the husband's constraint, it should not be admitted as part of the evidence.<sup>8</sup> A written confession of the wife

<sup>1</sup> Schmidt *v.* Schmidt, 29 N. J. Eq. 496; Hughs *v.* Hughs, 44 Ala. 698; True *v.* True, 6 Minn. 315.

<sup>2</sup> Prettyman *v.* Prettyman, 125 Ind. 149, 25 N. E. 179.

<sup>3</sup> Betts *v.* Betts, 1 Johns. Ch. 197.

<sup>4</sup> Matchin *v.* Matchin, 6 Pa. 332. In this case there was also strong circumstantial evidence.

<sup>5</sup> Madge *v.* Madge, 42 Hun, 524; Billings *v.* Billings, 11 Pick. 461.

<sup>6</sup> In some states the statute requires the evidence to be full and satisfactory independent of the confessions and admissions of the

parties. Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340. In Texas this was held to exclude the confessions of the parties. Stafford *v.* Stafford, 41 Tex. 111. But see Hanna *v.* Hanna, 3 Tex. Civ. Ap. 51, 21 S. W. 720.

<sup>7</sup> See Hansley *v.* Hansley, 10 Ire. Law, 506.

<sup>8</sup> Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340; Miller *v.* Miller, 2 N. J. Eq. 139; Callender *v.* Callender, 53 How. Pr. 364; Twyman *v.* Twyman, 27 Mo. 383.

that she had occupied a state-room with the alleged paramour during the night was excluded as involuntary, where she was persuaded that such confession would not be an admission of adultery; and the husband to induce her to sign it had promised to hire a house and go to housekeeping with her.<sup>1</sup> Such confession must be excluded if not fully understood or fairly obtained, although it has been formally sworn to before an authorized officer.<sup>2</sup> A confession copied by the wife in the presence of her husband from memoranda made for her, though signed in the presence of a witness, must be disregarded when all the circumstances create a strong suspicion that the acts confessed could not have taken place, and the subsequent conduct of the parties shows collusion.<sup>3</sup> Where the trial is to the court without a jury, it seems that the confession must be admitted in evidence to determine whether it is genuine, and then evidence is heard to establish its validity, leaving the court to determine its weight from the corroborative evidence. In a jury trial other considerations may control, but generally it may be admitted after establishing its validity.

**§ 782. Privileged communications between husband and wife.**—At common law neither the husband nor the wife could be a witness either for or against the other, partly on the ground of interest and identity, but principally on the ground of public policy which protected marital confidence by excluding all communications between husband and wife as privileged. When husband and wife are made competent witnesses by statute, this did not abrogate the common-law rule which excluded their conversations and communications.<sup>4</sup> The common law must be changed by some express enactment permitting the parties to relate their private conversations. Generally the statutes do not alter the common law, but simply express the common-law rule that such com-

<sup>1</sup> Derby *v.* Derby, 21 N. J. Eq. 36-48.      <sup>3</sup> Summerbell *v.* Summerbell, 37 N. J. Eq. 603.

<sup>2</sup> Id.

<sup>4</sup> Raynes *v.* Bennett, 114 Mass.

munications are privileged.<sup>1</sup> The general provisions of the statute relating to evidence are held to exclude this kind of testimony in actions for divorce.<sup>2</sup> This rule works great hardship where the husband has been guilty of extreme cruelty or of indignities rendering the wife's condition intolerable, as accusing the wife of adultery or using vile, abusive and profane language when others are not present; but even in such cases such evidence is not admitted even on the ground of necessity.<sup>3</sup>

The privilege extends not only to the conversations of the parties, but also to written communications, letters or telegrams.<sup>4</sup> The reason of the common-law rule extends to written as well as oral communications. The parties should be as free to write to each other as to talk together. But it is held that the privilege does not extend to conversations in the presence of others. A witness who secretly or accidentally overheard a conversation of the parties may relate it,<sup>5</sup> although both parties were unaware that they were overheard.<sup>6</sup> And when a letter of one of the parties falls into the hands of a third person it is said that "the sacred shield of privilege" is removed.<sup>7</sup> But it seems that the reason for the privilege would exist in all cases where the letter comes into the possession of a third person except where the writer voluntarily places it in the hands of others under such circumstances that it may be read. After the letter reaches the hands of the other party it should be privileged. No infidelity of the receiver can make it an instrument of evidence.

<sup>1</sup> *Cornish v. Cornish*, 56 Tex. 564; *contra*, *Fowler v. Fowler*, 11 N. Y. *Briggs v. Briggs* (R. I.), 26 A. 198; *Smith v. Smith*, 77 Ind. 80.

Supp. 419, 58 Hun, 601.

<sup>4</sup> *Brown v. Brown*, 53 Mo. Ap. 453.

<sup>2</sup> *Berlin v. Berlin*, 52 Mo. 151; *Moore v. Moore*, 51 Mo. 118; *Dwyer v. Dwyer*, 2 Mo. Ap. 17; *Stebbins v. Anthony*, 5 Colo. 348; *French v. French*, 14 Gray, 186.

<sup>5</sup> *Toole v. Toole*, 112 N. C. 152.

<sup>3</sup> *Miller v. Miller*, 14 Mo. Ap. 418; *Vogel v. Vogel*, 13 Mo. Ap. 588; *Dwyer v. Dwyer*, 2 Mo. Ap. 17; *Ayers v. Ayers*, 28 Mo. Ap. 97. See *See* *S. v. Centre*, 35 Vt. 378; *Gannon v. P.*, 127 Ill. 518; *Jacobs v. Hesler*, 113 Mass. 157.

<sup>6</sup> *Com. v. Griffin*, 110 Mass. 181; *S. v. Buffington*, 20 Kan. 599; *Ayers v. Hoyt*, 47 Conn. 518, 540.

The same privilege continues after the marriage is dissolved, and neither of the divorced parties can reveal any information acquired during the marriage.<sup>1</sup> But their communications made after divorce are admissible.<sup>2</sup>

**§ 783. Privileged communications to physicians and attorneys.**—The testimony of physicians is often resorted to in actions for divorce for cruelty or adultery. Their testimony is admissible as in other cases. At common law the communications of patients to their physicians were not privileged, and so are not protected unless by statute.<sup>3</sup> The statutes are held to extend their protection to all information received by eye or ear, from observation of the patient's symptoms, and from statements of others around him as well as those of the patient himself.<sup>4</sup> A letter addressed to a physician is a privileged communication if the facts disclosed in it are necessary to enable the physician to prescribe.<sup>5</sup> In an action for divorce for adultery, where it is claimed that defendant has a venereal disease, a physician cannot, against the defendant's objection, disclose any information acquired in his professional employment.<sup>6</sup> Such communications, like those made by a client to counsel, or by a layman to a clergyman, are admissible unless the privilege is claimed. The patient may waive this privilege and allow the physician to testify.<sup>7</sup> Communications to an attorney, in the presence of another party who acts as a friend

<sup>1</sup> *S. v. Jolly*, 3 Dev. & Bat. 110; *Owen v. S.*, 78 Ala. 425; *Barnes v. Camack*, 1 Barb. Ch. 392; *S. v. J. B. N.*, 1 Tyler, 36, overruled in *S. v. Phelps*, 2 Tyler, 374; *Cook v. Grange*, 18 O. 526; *Kimbrough v. Mitchell*, 1 Head, 539; *Brock v. Brock*, 116 Pa. 109; *Perry v. Randall*, 83 Ind. 143; *Anderson v. Anderson*, 9 Kan. 112; *Elswick v. C.*, 13 Bush, 155; *Mercer v. Patterson*, 41 Ind. 440; *Chamberlain v. P.*, 23 N. Y. 85.

<sup>2</sup> *Long v. S.*, 86 Ala. 36.

<sup>3</sup> *Grattam v. Nat. Life Ins. Co.*, 15 Hun (N. Y.), 74.

<sup>4</sup> *Rapelje on Witnesses*, § 272.

<sup>5</sup> *Briggs v. Briggs*, 20 Mich. 34.

<sup>6</sup> *Johnson v. Johnson*, 4 Paige, 468; *s. c.*, 14 Wend. 641; *Hunn v. Hunn*, 1 Thomp. & C. 499; *Venzke v. Venzke*, 94 Cal. 225.

<sup>7</sup> A party may claim the privilege where the communications are stated in an affidavit to be used on a hearing for temporary alimony. *Schlosser v. Schlosser*, 29 Ind. 488.

and agent, and the conversation of all three persons in regard to the cause of action, are admissible where the attorney is not employed at the time, or subsequently employed, as attorney.<sup>1</sup>

**§ 784. Testimony of children of the parties.**— Children who are of sufficient age may testify as in other actions, but their testimony is not regarded with much favor. Children of the parties to the suit are often biased in favor of one parent as against the other, and for that reason as well as their mental immaturity their testimony is received with caution and accorded but little weight.<sup>2</sup> Where the cause for divorce is adultery, it is manifestly improper to call the children of the parties to establish the guilt of one of the parents. “It is a great wrong to them, not only as it touches them in their natural affections, but also as it tends to destroy their purity of mind and conduct. Moreover, the evidence of such children to acts which will naturally be construed by their prepossessions and immature and incorrect notions is of very slight value, even when honestly called out and given, and is easily shaped and perverted if a dishonest father shall be so inclined.”<sup>3</sup> As the cause for divorce must be established by full and satisfactory evidence, the testimony of children of the parties, without other evidence, is insufficient to justify a decree.<sup>4</sup> Where the husband and wife contradict each other, and their testimony is of equal credibility, the testimony of their children, if consistent, may create a satisfactory preponderance in favor of one party.<sup>5</sup>

**§ 785. Relatives and servants as witnesses.**— In the old reports there is some comment on the value of the testimony of relatives and servants, but similar considerations will not

<sup>1</sup> *Sharon v. Sharon*, 79 Cal. 633.

<sup>3</sup> *Crowner v. Crowner*, 44 Mich.

<sup>2</sup> *Blake v. Blake*, 70 Ill. 618; *Phil-*

<sup>180.</sup>

*lips v. Phillips*, 91 Ga. 551, 17 S. E. 633; *Fox v. Fox*, 25 Cal. 587; *Lockwood v. Lockwood*, 2 Curt. Eq. 281.

<sup>4</sup> *Kneale v. Kneale*, 28 Mich. 344.

<sup>5</sup> *Crichton v. Crichton*, 73 Wis. 59, 40 N. W. 638; *Land v. Mullin*, — La. —, 15 So. 657.

apply to their testimony at the present time because such persons are not as dependent as formerly.<sup>1</sup> Such testimony should be examined with care, as it is seldom free from bias, and is not entitled to the weight of the testimony of witnesses not related or otherwise interested.<sup>2</sup> The proverbial bias of the mother-in-law in favor of her child as against her son-in-law or daughter-in-law has often been the subject of unfavorable comment in the reports.<sup>3</sup>

<sup>1</sup>See remarks in *Dysart v. Dysart*, 1 Rob. Eq. 106; *Ciocci v. Ciocci*, 26 L. & Eq. 604; s. c., 1 Spinks, 121.

<sup>2</sup>Jenkins *v. Jenkins*, 86 Ill. 340; *Hampton v. Hampton*, 87 Va. 148, 12 S. E. 340; *Hughs v. Hughs*, 44

Ala. 698; *Reading v. Reading* (N. J.), 8 A. 809.

<sup>3</sup>*Berckmans v. Berckmans*, 16 N. J. Eq. 122; s. c., 17 N. J. Eq. 453; *Edmond's Appeal*, 57 Pa. 232; *Fanning v. Fanning*, 20 N. Y. Supp. 849; *Murray v. Murray*, 66 Tex. 207, 18 S. W. 506.

## TRIAL AND APPEAL.

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§ 800. The trial — Open court.	§ 805. The right to dismiss.
801. Trial by jury and verdict.	806. Reference.
802. The right to open and close.	807. Costs.
803. When the divorce suit follows the code procedure.	808. New trials.
804. Change of venue.	809. Appeal.

**§ 800. The trial — Open court.**— Under the early chancery practice the chancellor did not hear oral testimony but determined the case on the depositions of the witnesses. If the divorce suit follows the chancery practice it would be proper to try the issues in the same manner unless the statutes provide otherwise. In some states it is required that the case shall be tried in open court or that the witnesses shall be examined in open court.<sup>1</sup> It is supposed that a public trial is a safeguard against bribery and collusion and that the best interests of the state demand it. An open court is a court formally opened and engaged in the transaction of judicial affairs, to which all persons who conduct themselves in an orderly manner are admitted.<sup>2</sup> A statute which requires a court to proceed to "hear the cause by examination of witnesses in open court" is not complied with by hearing the testimony of one witness and the deposition of another.<sup>3</sup> In the absence of any statute to the contrary, it is supposed that a court may hear a nullity suit in private where the evidence is offensive and the parties do not object.<sup>4</sup>

<sup>1</sup> See *Hobart v. Hobart*, 45 Ia. 501; <sup>3</sup> *Suesemilch v. Suesemilch*, 43 Cross v. Cross 55 Mich. 280. Ill. Ap. 573.

<sup>2</sup> *Hobart v. Hobart*, 45 Ia. 501.

<sup>4</sup> 2 Bishop, Mar., Sep. & Div. 674.

**§ 801. Trial by jury and verdict.**—In the ecclesiastical courts the judge heard the divorce suit without the intervention of a jury;<sup>1</sup> and this is the common practice in our country unless the statute provides for a jury trial.<sup>2</sup> If a jury trial is permitted by statute it is a matter of right unless waived.<sup>3</sup> In the absence of statute the parties have no constitutional right to a trial by jury, since such right did not exist at common law.<sup>4</sup> Where a jury is required the court may instruct them as in other cases.<sup>5</sup> And a request for special findings may be submitted to the jury under the provisions of the code,<sup>6</sup> and the court may make additional findings on issues not presented to the jury.<sup>7</sup> Where the divorce suit follows the chancery practice the court may submit certain issues to the jury; but the refusal to do so is within the discretionary power of the court and is not subject to review.<sup>8</sup> In such case the verdict of the jury is not binding on the court, but is simply advisory, and may be disregarded.<sup>9</sup> But the action of the court in entering a decree

<sup>1</sup> *Caton v. Caton*, 13 Jur. 431.

<sup>2</sup> *Slade v. Slade*, 58 Me. 157; *Coffin v. Coffin*, 55 Me. 361; *Hobart v. Hobart*, 51 Ia. 512; *Carpenter v. Carpenter*, 30 Kan. 712; *Simpson v. Simpson*, 25 Ark. 487; *Madison v. Madison*, 1 Wash. Ter. 60; *Allison v. Allison*, 46 Pa. 321; *Miles v. Miles*, 2 Jones Eq. 21; *Carre v. Carre*, 2 Yeates, 207. In New York the issue of adultery must be tried by a jury. *Dietz v. Dietz*, 4 Thomp. & C. 565; *Conderman v. Conderman*, 44 Hun, 181; *Galusha v. Galusha*, 43 Hun, 181; *Baltzell v. Baltzell*, 42 N. Y. Sup. Ct. 561; *Whale v. Whale*, 1 Code R. 115; *Anon.*, 3 Code R. 139; *Parker v. Parker*, 3 Abb. Pr. 478; *Anon.*, 5 How. Pr. 306; *Winans v. Winans*, 54 N. Y. Sup. Ct. 542.

<sup>3</sup> *Dietz v. Dietz*, 4 Thomp. & C. 565, 2 Hun, 239; *Razor v. Razor*, 42

Ill. Ap. 504; *Black v. Black*, 5 Mont. 15. See, also, *Keller v. Keller*, 2 Woodward, 483; *Schaeffer v. Schaeffer*, 3 Kulp, 14; *Uhrich v. Uhrich*, 3 Kulp, 14; *Jordon v. Jordon*, 13 W. N. C. 193.

<sup>4</sup> *Cassiday v. Cassiday*, 64 Cal. 266; *Mead v. Mead*, 1 Mo. Ap. 247.

<sup>5</sup> *Smith v. Smith*, 72 N. C. 139; *Richmond v. Richmond*, 10 Yerg. 343.

<sup>6</sup> *Morrison v. Morrison*, 14 Mont. 8, 35 P. 1; *Morse v. Morse*, 25 Ind. 156; *Ewing v. Ewing*, 24 Ind. 468; *Bradley v. Bradley*, 45 Ind. 67; *Cullen v. Cullen*, 44 Kan. 370.

<sup>7</sup> *Schmidt v. Schmidt*, 31 Minn. 106.

<sup>8</sup> *Anon.*, 35 Ala. 226; *Leffel v. Leffel*, 35 Ind. 76; *Burkley v. Burkley*, 56 N. Y. 192.

<sup>9</sup> *Lewis v. Lewis*, 9 Ind. 105; *Haygood v. Haygood*, 25 Tex. 576;

in opposition to the verdict is subject to review.<sup>1</sup> If a jury trial is required by statute it would seem that the verdict should not be advisory, but should have all the force and effect of a verdict at common law.<sup>2</sup>

**§ 802. The right to open and close.**—The suit for divorce is often a complex proceeding. The issue presented by the complainant may be denied by the defendant, who may tender an issue of far greater importance. Thus the defendant may deny the validity of the marriage and pray that the same may be annulled. Or he may set up some offense of the plaintiff in recrimination, and this issue will become the main issue of the case, toward which most of the proof is directed. In reason, the party who tenders the principal issue assumes the burden of proof and is therefore entitled to open and close. Thus, where the wife brought an action for separate maintenance on account of desertion, the husband denied the desertion and set up the adultery of the wife in a cross-petition as a cause for divorce, and at the trial the adultery became the principal issue. It was held that the husband should have the right to open and close the case, but the court had a right to direct the method of the trial, and the refusal to permit the defendant to open and close the case was not an abuse of discretion.<sup>3</sup>

**§ 803. When the divorce suit follows the code procedure.**—Since the suit for divorce is governed by peculiar principles of its own, it is clear that all the provisions of the code are not applicable. For instance, the provisions relating to confessions of judgment have no application in a suit for divorce, where the court must disregard the confession

O'Bryan v. O'Bryan, 13 Mo. 16; Montfort v. Montfort, 88 Ga. 641, Muloch v. Muloch, 1 Edw. Ch. 14; 15 S. E. 688; Carpenter v. Carpenter, 9 N. Y. Supp. 583; Richmond v. Richmond, 10 Yerg. (Tenn.) 343. Paulson v. Paulson (Tex.), 21 S. W. 778; Moore v. Moore, 22 Tex. 237; Morse v. Morse, 25 Ind. 156. See *contra*, Beck v. Beck, 6 Mont. 318, 12 P. 694.

<sup>1</sup> Jernigan v. Jernigan, 37 Tex. 420.

<sup>2</sup> Razor v. Razor, 42 Ill. Ap. 504; Poertner v. Poertner, 66 Wis. 644;

<sup>3</sup> Razor v. Razor, 149 Ill. 621, 42 Ill. Ap. 504.

or default of a party, and refuse a decree unless the cause for divorce is established by clear and satisfactory evidence. The practice in the ecclesiastical courts cannot be followed, because our courts have established rules of practice and codes of civil procedure. When jurisdiction to grant divorce was conferred upon our courts, it was not intended that the practice would be changed. The divorce statutes sometimes contain special provisions governing the divorce suit, and the inference is that in all other respects the practice may follow the usual course of proceedings. The divorce act may contain no provision for answer, cross-petition, demurrs, amendment of pleadings, reply, motions for continuance or new trials, service of summons, change of venue, bills of exception, appeal, or similar pleadings and proceedings. Yet all such provisions of the code are applicable to the divorce suit, because the divorce act would be inoperative unless such procedure could be followed.<sup>1</sup> But if the statute is silent as to the method of procedure, or contains no provision giving full scope to a right which is a part of the common law of divorce, the ecclesiastical practice may be followed. If the statute is silent in regard to such defenses as connivance, collusion or recrimination, the right to interpose such defense will exist as a part of the common law of divorce. The right to file a cross-petition in an action for divorce and to obtain affirmative relief is not to be derived from the divorce act, or from the usual provision of the codes relating to set-off and counter-claim. In the absence of any provision for such a pleading, the defendant may obtain relief by following the ecclesiastical practice, which is a part of the common law of our country, except as modified by our statutes.<sup>2</sup> All provisions of the code, unless manifestly in conflict with the reason and policy of divorce law, or the provisions of the divorce act, are applicable to the proceedings for divorce.

<sup>1</sup> *Powell v. Powell*, 104 Ind. 18; P. 886, citing *G. v. G.*, 33 Md. 401; *Evans v. Evans*, 105 Ind. 204.      *Le Barron v. Le Barron*, 35 Vt. 365.

<sup>2</sup> *Wuest v. Wuest*, 17 Nev. 217, 30

**§ 804. Change of venue.**—A suit for divorce is a civil case within the meaning of a code providing for a change of venue in civil cases. The divorce proceeding in most of the states must follow the procedure in other civil cases, where the act relating to divorce is silent as to questions of pleading and practice, unless the code is for some reason inapplicable. For this reason it is held that the provisions of the code relating to a change of venue or the right to appoint a special judge are applicable to divorce suits;<sup>1</sup> but not to applications to revise decrees of alimony.<sup>2</sup> If the statute gives a peremptory right to a change of venue, the motion must be granted before an order for temporary alimony is made.<sup>3</sup> Where a change of venue is demanded on the ground of local prejudice or undue influence over the citizens of the county, a different question arises, since such provision evidently refers to a trial by jury, while in a divorce suit the court may in its discretion refuse a trial by jury. But if the statute evidently includes all civil actions a change of venue must be granted. The legislature having permitted the change in all cases, the court will not inquire into the reasons for the provision, and adjudge them sufficient or insufficient.<sup>4</sup> But the court may determine that from the nature of the proceeding for divorce the code provision is or is not applicable.<sup>5</sup>

**§ 805. The right to dismiss.**—The right of the plaintiff to dismiss an action for divorce requires some notice here, because it differs from the plaintiff's right in other actions. Under the chancery practice it is well settled that, at any time prior to the decree, the complainant has the right to control the fortunes of his own bill, and on payment of costs can dismiss it as a matter of course.<sup>6</sup> And under the codes

<sup>1</sup> *Moe v. Moe*, 39 Wis. 309; *Powell v. Powell*, 104 Ind. 18, overruling *Musselman v. Musselman*, 44 Ind. 106.

<sup>2</sup> *Hopkins v. Hopkins*, 40 Wis. 462. See *contra*, *McPike v. McPike*, 10 Ill. Ap. 332.

<sup>3</sup> *Hennessy v. Nicol* (Cal.), 38 P. 649.

<sup>4</sup> *Evans v. Evans*, 105 Ind. 204. <sup>5</sup> See, also, *Usher v. Usher* (Cal.), 36 P. 8; *Warner v. Warner*, 100 Cal. 11, 34 P. 523.

<sup>6</sup> *Clark v. Clark*, 29 Ill. Ap. 257.

of civil procedure the plaintiff has even greater rights, and may dismiss an action in vacation by filing an order for dismissal.<sup>1</sup> But the action for divorce in this respect is *sui generis*, and cannot be dismissed without permission of the court if the defendant has entered an appearance.<sup>2</sup> There must be an application to the court so that the rights of the parties and their attorneys can be adjusted and all the matters pertaining to the suit disposed of. The application for temporary alimony must be acted upon, and the plaintiff's dismissal will not deprive the court of jurisdiction to award alimony and costs.<sup>3</sup> The court has also the discretionary power to make all necessary orders to compel the payment of attorneys' fees, although the parties have agreed to dismiss the suit and resume cohabitation.<sup>4</sup> The action of the court in this matter is not ordinarily subject to review. Sometimes the courts have disregarded the rights of the attorneys for the wife and refused to make any allowance for their services in preparing a defense for her.<sup>5</sup> But the cases are wrong in principle, for it is good policy to encourage the wife to make every possible defense and thus discourage and prevent divorces. When the services are rendered in part by the preparation of a defense, the court should see

<sup>1</sup> *Courtney v. Courtney*, 4 Ind. Ap. 221, 30 N. E. 914. *v. Thompson*, 40 Tenn. (3 Head), 526.

<sup>2</sup> *Winans v. Winans*, 124 N. Y. 140, 36 N. E. 293; *Murphy v. Murphy*, 8 Phila. 357; *Cooper v. Cooper*, 2 Swab. & T. 392; *Campbell v. Campbell*, 12 Hun, 636, 54 How. Pr. 115; *Leslie v. Leslie*, 10 Abb. Pr. (N. S.) 64.

<sup>3</sup> *Butler v. Butler*, 38 N. J. Eq. 626; *Weaver v. Weaver*, 33 Ga. 172; *Leslie v. Leslie*, 10 Abb. Pr. (N. S.) 64; *Clymer v. Clymer*, 45 Leg. Int. (Pa.) 379; *Kinchloe v. Merriam*, 54 Ark. 557; *Chase v. Chase*, 65 How. Pr. 308; *Louden v. Louden*, 65 How. Pr. 411; *Smith v. Smith*, 35 Hun, 378; *Thorndike v. Thorndike*, 1 Wash. 175. See *contra*, *Thompson* 526.

<sup>4</sup> *Courtney v. Courtney*, 4 Ind. Ap. 221, 30 N. E. 914; *Reynolds v. Supr. Ct.*, 6 P. 421, 7 P. 480; *Dixon v. Dixon*, 2 P. & M. 253; *Wagner v. Wagner*, 34 Minn. 441; *Waters v. Waters*, 49 Mo. 385; *Burgess v. Burgess*, 1 Duv. (Ky.) 287; *Phillips v. Simons*, 11 Abb. Pr. 288; *Kirby v. Kirby*, 1 Paige, 565; *Gossett v. Patten*, 23 Kan. 341.

<sup>5</sup> *Reynolds v. Reynolds*, 67 Cal. 176; *Moore v. Moore*, 22 N. Y. Supp. 451; *Newman v. Newman*, 69 Ill. 167; *Persons v. Persons*, 7 Humph. 183; *McCulloch v. Murphy*, 45 Ill. 256.

that the attorney receives some remuneration when the dismissal is entered.<sup>1</sup> In no case will the dismissal of a bill defeat the right of the defendant to obtain the relief asked for in the cross-bill.<sup>2</sup> And where there is no cross-bill, but a mere denial of the marriage, the plaintiff cannot dismiss, but the court will proceed in the action and determine the validity of the marriage, since the second wife and the general public have a right to have the *status* of the second wife and her children determined in this action.<sup>3</sup> Ordinarily the plaintiff has no right to dismiss without prejudice after the issues have been submitted to the court or jury; but where, by oversight or surprise, the plaintiff has failed to introduce essential testimony, the court may, in its discretion, permit the plaintiff to recall the submission and dismiss without prejudice.<sup>4</sup> The action should be dismissed for want of prosecution as in other cases. In no case should a delay be allowed where the wife is receiving instalments of temporary alimony and will profit by delay. If the husband is unable to pay the alimony as ordered, the court may, in its discretion, require the parties to proceed to trial or otherwise grant the husband's application to dismiss the action.

**§ 806. Reference.**—In the absence of any statute requiring divorce suits to be tried by a jury, or in open court, or by the court without the intervention of the jury, the ecclesiastical practice will obtain and the action will be tried before the court.<sup>5</sup> In such case it is doubtful whether a reference may be ordered when both parties consent. If the statute requires a trial by jury, the court should refuse a reference upon the stipulation of the parties.<sup>6</sup> There are some grave objections to the appointment of a referee in actions for divorce. There is a great temptation to avoid an intelligent examination of the witness which might de-

<sup>1</sup> *Green v. Green*, 40 How. Pr. 465.      <sup>4</sup> *Ashmead v. Ashmead*, 23 Kan. See, also, *Aspinwall v. Sabin*, 22 Neb. 73, 34 N. W. 72.      <sup>2</sup> 262.

<sup>5</sup> *Mangels v. Mangels*, 6 Mo. Ap. 481.

<sup>2</sup> See, also, § 745.      <sup>3</sup> *Winans v. Winans*, 124 N. Y. 140, 26 N. E. 293.      <sup>6</sup> *Simmons v. Simmons*, 3 Rob. (N. Y.) 642.

velop some defense to the action. If it appear that the offense has been condoned, or there is some evidence of recrimination, the referee may neglect to inquire into the matter, and the evidence will not be taken, so that the court will be apprised of the defense and the real merits of the case. The state, which is always an interested party in every divorce suit, cannot be fairly represented in a proceeding before a referee who does not investigate every suspicious circumstance in the case. There is a general belief, not entirely without foundation, that reference gives too much opportunity to fraud and collusion, and other evils which flow from hasty and secret divorces; and such practice is not permitted in most of the states. Where the divorce suit proceeds under the chancery practice, the courts may, in accordance with their usual mode of procedure, refer the suit to a master in chancery.<sup>1</sup> The powers and duties of referees in divorce cases, as regulated by the practice in New York state, are not of general interest to the profession, but may be determined by examining the provisions of the code and the following adjudications.<sup>2</sup> This practice is

<sup>1</sup> *Shillinger v. Shillinger*, 14 Ill. 1070; *Jones v. Jones*, 71 Hun, 519, 147; *Stone v. Stone*, 28 N. J. Eq. 409; *Mangels v. Mangels*, 6 Mo. Ap. 481; *Graves v. Graves*, 2 Paige (N. Y.), 62; *Dodge v. Dodge*, 7 Paige, 589; *Moore v. Moore*, 56 N. H. 512; *Renwick v. Renwick*, 10 Paige, 420; *Hart v. Hart*, 2 Edw. Ch. 207; *Pugsley v. Pugsley*, 9 Paige, 589; *Banta v. Banta*, 3 Edw. Ch. 295; *Lincoln v. Lincoln*, 6 Rob. 625; *P. v. McGinnis*, 1 Park. 387.

<sup>2</sup> *Ryerson v. Ryerson*, 7 N. Y. Supp. 726, 55 Hun, 191; *Goodrich v. Goodrich*, 21 Weekly Digest, 264; *Uhlmann v. Uhlmann*, 17 Ab. N. C. 236, 264; *Matthews v. Matthews*, 6 N. Y. Supp. 589, 53 Hun, 244; *Ross v. Ross*, 31 Hun, 140; *Griffin v. Griffin*, 70 Hun, 73, 23 N. Y. Supp.

1070; *Jones v. Jones*, 71 Hun, 519, 24 N. Y. Supp. 1031, and cases cited; *Rice v. Rice*, 22 W. Dig. 258; *Smith v. Smith*, 4 Monthly L. Bul. 57; *Schroeter v. Schroeter*, 30 Hun, 230; *Harding v. Harding*, 11 J. & S. 27; *Bihin v. Bihin*, 17 Ab. Pr. 19; *Arborgast v. Arborgast*, 8 How. Pr. 297; *Turney v. Turney*, 4 Edw. Ch. 566; *Fairbanks v. Fairbanks*, 2 Edw. Ch. 208; *Glick v. Glick*, 5 Month. L. Bul. 62; *Bloodgood v. Bloodgood*, Daily Reg., Apr. 30, 1884; *Gade v. Gade*, 14 Ab. N. C. 510; *Greene v. Greene*, 14 W. Dig. 159; *Blott v. Ryder*, 47 How. Pr. 90; *Thornton v. Thornton*, 66 How. Pr. 119; *Moore v. Moore*, 24 W. Dig. 255; *Burgess v. Burgess*, 52 N. Y. Supp. (J. & S.) 545; *Bliss v. Bliss*, 11

permitted under the statutes of some other states.<sup>1</sup> In New York the defendant has an absolute right to a trial by jury where the adultery is alleged as a cause for divorce. A reference cannot be ordered without the consent of the defendant in such cases.<sup>2</sup> Where the parties have had a hearing before a referee by consent, the court may refuse the plaintiff's request for a trial by jury, as the consent to a reference is a waiver of the right, and the court may in its discretion refuse to grant a jury trial.<sup>3</sup>

**§ 807. Costs.**—There is no absolute rule for the taxation of costs in an action for divorce. In general it may be said that the costs are not always taxed against the defeated party as in the ordinary suit.<sup>4</sup> The court may, in its discretion, apportion the costs as may be equitable under all the circumstances of the case, taking into consideration the merits of the case, the property of each party, and all other facts which may properly influence the court in adjusting the rights of the parties. Unless there has been an abuse of this discretion the reviewing court will not interfere with the determination of the trial court.<sup>5</sup> Owing to the identity of the parties and the husband's control of all the property, the ecclesiastical courts generally allowed the wife her costs whether successful or not.<sup>6</sup> For similar reasons our courts

Civil Pro. R. 94; *Waterman v. Waterman*, 37 How. Pr. 36; *Didell v. Didell*, 3 Ab. Pr. 167; *McCleary v. McCleary*, 30 Hun, 154; *Paul v. Paul*, 11 N. Y. St. R. 71, and cases cited; *Smith v. Smith*, 23 Civil Pro. 386; s. c., 7 Misc. 305, 37 N. E. 569; *Bliss v. Bliss*, 13 Daly, 489; *Harding v. Harding*, 53 How. Pr. 238; *Ives v. Ives*, 7 Misc. 328; *Merrill v. Merrill*, 11 Ab. Pr. (N. S.) 74.

<sup>1</sup> *Hobart v. Hobart*, 45 Ia. 501; *Baker v. Baker*, 10 Cal. 257. See statement of duties of referee and effect of his finding under the code. *Gibson v. Gibson*, 24 Neb. 394.

<sup>2</sup> *Batzell v. Batzell*, 10 J. & S. 561.

<sup>3</sup> *Winans v. Winans*, 124 N. Y. 140, 26 N. E. 293.

<sup>4</sup> *Shoop's Appeal*, 34 Pa. 233; *Nikirk v. Nikirk*, 3 Met. (Ky.) 432; *Dugan v. Dugan*, 1 Duv. 289.

<sup>5</sup> *Sumner v. Sumner*, 54 Wis. 642.

<sup>6</sup> *Wells v. Wells*, 1 Swab. & T. 308; *Evans v. Evans*, 1 Swab. & T. 328; *Ditchfield v. Ditchfield*, 1 P. & M. 729; *Holt v. Holt*, 28 L. J. Mat. Cas. 12. But see *Jones v. Jones*, 2 P. & M. 333. The wife is allowed the costs of a continuance and the mileage and expenses of a witness sent abroad to obtain material testimony. *Allen v. Allen*, 2 Swab. & T. 107.

rarely decree costs against a defeated wife.<sup>1</sup> If the wife has been unsuccessful the husband may be compelled to pay the costs, and if his conduct has been improper and unjust the decree for costs "may be a salutary admonition to him to govern himself and regulate his conduct in the future."<sup>2</sup> A sound public policy requires that unfounded and vexatious suits for divorce should be discouraged, especially where the object of the proceeding is to obtain temporary alimony.<sup>3</sup> This kind of litigation should not be encouraged by the knowledge that the wife will recover her costs at all events.<sup>4</sup> But generally the wife should be allowed costs if she has brought the suit in good faith.<sup>5</sup> Or, if she has been compelled by her husband's allegations to prepare a defense, she should be allowed her costs, although the husband dismisses the suit.<sup>6</sup> Where the husband withdraws his answer and allows a default to be taken against him, it is an abuse of discretion to tax as costs the fees and expenses unnecessarily incurred.<sup>7</sup> The costs of appeal are governed by similar considerations, but generally the wife is allowed costs even though the decree is affirmed, if the appeal is taken in good faith.<sup>8</sup> Where the parties are equally at fault each should be condemned to pay his own costs.<sup>9</sup> But if the wife's suit

<sup>1</sup> *Coad v. Coad*, 40 Wis. 392; *Bender v. Bender*, 14 Or. 353, 12 P. 713; *De Rose v. De Rose*, Hopkins Ch. 100; *Thatcher v. Thatcher*, 17 Ill. 66; *McKay v. McKay*, 6 Grant, U. C. 330; *Richardson v. Richardson*, 4 Port. 467; *Wood v. Wood*, 2 Paige, 454; *Main v. Main*, 50 N. J. Eq. 712, 25 A. 372. The wife may show that the husband is not entitled to sue as a pauper. *Moyers v. Moyers*, 58 Tenn. 495. For rule of costs in action *forma pauperis*, see *Moon v. Moon*, 43 N. J. Eq. 403, 3 A. 350.

<sup>2</sup> *Phillips v. Phillips*, 27 Wis. 252; *Sumner v. Sumner*, 54 Wis. 642.

<sup>3</sup> See, also, *Balkum v. Balkum*, 83 Ala. 449.

<sup>4</sup> See *Soper v. Soper*, 29 Mich. 305; *German v. German*, 57 Mich. 256; *Clark v. Clark*, 4 Swab. & T. 111.

<sup>5</sup> *Bishop v. Bishop*, 17 Mich. 211; *De Meli v. De Meli*, 5 Civil Pro. 306; *Stafford v. Stafford*, 53 Mich. 522; *Ash v. Ash*, 1893 Prob. 524.

<sup>6</sup> *Thorndyke v. Thorndyke*, 1 Wash. Ter. 175. See *contra*, *Moore v. Moore*, 22 N. Y. Supp. 451.

<sup>7</sup> *Firman v. Firman*, 109 Ill. 63; *Kendall v. Kendall*, 1 Barb. Ch. 610.

<sup>8</sup> *Rayner v. Rayner*, 49 Mich. 600; *Whitmore v. Whitmore*, 49 Mich. 417.

<sup>9</sup> *Cox v. Cox*, 35 Mich. 461.

is brought without reasonable grounds the court may deny costs.<sup>1</sup> For the protection of clerks and other officers the plaintiff is sometimes required by rule of court to pay all costs before the decree is entered. Such rule is void if it in any way interferes with the discretion of the court in adjusting the costs that each party should pay.<sup>2</sup> The decree for costs may be enforced by attachment for contempt or by execution.<sup>3</sup>

**§ 808. New trials.**—The practice of each state will govern the granting of new trials. Generally the courts will grant new trials as in other cases and upon the same grounds.<sup>4</sup> In actions for divorce the courts are invested with a wider discretion than in other proceedings and may grant a new trial under circumstances not quite adequate in other proceedings.<sup>5</sup> The provisions of the code relating to new trials are generally applicable to proceedings for divorce or annulment of marriage.<sup>6</sup> A new trial may be granted as to the

<sup>1</sup> *Flower v. Flower*, 3 P. & M. 132; *Heal v. Heal*, 1 P. & M. 300.

N. H. 144; *Nutting v. Hurbert*, 37 N. H. 346. See, also, *Fitzgerald v. Fitzgerald*, 3 Swab. & T. 400; *Folsom v. Folsom*, 55 N. H. 78; *Goodrich v. Goodrich*, 2 P. & M. 392; *Ahier v. Ahier*, 10 P. D. 110; *Taplin v. Taplin*, 13 P. D. 100; *Lee v. Lee*, 2 P. & M. 409; *Hitchcock v. Hitchcock*, 2 Swab. & T. 513; *Morphett v. Morphett*, 1 P. & M. 702; *Bacon v. Bacon*, 2 Swab. & T. 53; *Kolb's Case*, 4 Watts, 154; *McGonigal v. McGonigal*, 30 New Brunswick, 1; *Jago v. Jago*, 3 Swab. & T. 103; *Dolby v. Dolby*, 2 Swab. & T. 228; *Stoate v. Stoate*, 2 Swab. & T. 384; *Hill v. Hill*, 2 Swab. & T. 407.

<sup>2</sup> *State v. Bates*, 5 O. Ct. Rep. 18.

<sup>3</sup> *Cockefair v. Cockefair*, 23 Abb. N. Cas. 219, 7 N. Y. Sup. 170; *McInall v. McInall*, 17 W. N. C. 312.

<sup>4</sup> *Mercer v. Mercer*, 114 Ind. 558, 17 N. E. 182; *Ewing v. Ewing*, 24 Ind. 468; *Forrest v. Forrest*, 25 N. Y. 501; *Meyar v. Meyar*, 3 Met. 298; *Mercer v. Mercer*, 1 MacAr. 655; *Sharon v. Sharon*, 79 Cal. 633, 22 P. 131; *Chapman v. Chapman*, 129 Ill. 386, 21 N. E. 806; *Gardner v. Gardner*, 68 Mass. 435; *Gholston v. Gholston*, 31 Ga. 625; *Tierney v. Tierney*, 1 Wash. 568; *Poertner v. Poertner*, 66 Wis. 644; *Ferguson v. Ferguson*, 3 Sandf. 307; *Amory v. Amory*, 6 Rob. (N. Y.) 514; *Conger v. Conger*, 77 N. Y. 433; *Rindge v. Rindge*, 22 Ind. 31; *Matthi v. Matthi*, 49 Cal. 90; *Ulrich v. Ulrich*, 8 Kan. 402; *Janvrin v. Janvrin*, 58

<sup>5</sup> *Dunn v. Dunn*, 11 Mich. 284; *Bostwick v. Bostwick*, 73 Tex. 182.

<sup>6</sup> It is not error to grant a new trial on account of newly discovered evidence that the plaintiff was not a resident of the state at the time he obtained the decree.

issues relating to property rights without disturbing the decree of divorce.<sup>1</sup> This is perhaps the safest course, as in some states the decree of divorce is an adjudication of all property rights depending upon the marriage relation.

**§ 809. Appeal.**—The right to appeal from a decree of divorce must be derived in some way from the statute, as the right did not exist at common law.<sup>2</sup> Generally the statutes permitting appeals in actions in equity are held applicable to proceedings for divorce.<sup>3</sup> A statute giving the right of appeal in all civil actions includes actions for divorce.<sup>4</sup> In some states the decree of divorce is reviewed on appeal as other chancery decrees.<sup>5</sup> In Indiana, Kentucky and Ohio the decree of divorce is final, but an appeal lies from orders granting alimony.<sup>6</sup> It has been said that “When a divorce

*Grant v. Grant* (S. Dak.), 60 N. W. 743. also, *Hanberry v. Hanberry*, 29 Ala. 719; *Hansford v. Hansford*, 10 Ala. 561; *Underwood v. Underwood*, 12 Fla. 434; *Krone v. Linville*, 31 Md. 138.

<sup>1</sup> *Lake v. Bender*, 18 Nev. 361.

<sup>2</sup> *Simpson v. Simpson*, 25 Ark. 487. See discussion of this point in dissenting opinion of Judge McKee in *Sharon v. Sharon*, 67 Cal. 199, citing statutes and cases.

<sup>3</sup> *Sharon v. Sharon*, 67 Cal. 185; *Brotherton v. Brotherton*, 12 Neb. 72; *Jungk v. Jungk*, 5 Ia. 541.

<sup>4</sup> *Sherwood v. Sherwood*, 44 Ia. 192. But see, *contra*, *Lucas v. Lucas*, 69 Mass. 136.

<sup>5</sup> *Fulton v. Fulton*, 36 Miss. 517; *Hitchcox v. Hitchcox*, 2 W. Va. 435; *Robbarts v. Robbarts*, 9 S. & R. 191; *Brentlinger v. Brentlinger*, 4 Rawle, 241; *Brom v. Brom*, 2 Whart. 94; *Hoffman v. Hoffman*, 30 Pa. 417; *Hoffmire v. Hoffmire*, 7 Paige, 60; *Dunn v. Dunn*, 4 Paige, 425; *Smith v. Smith*, 4 Paige, 432; *Phelps v. Phelps*, 7 Paige, 150; *Burr v. Burr*, 10 Paige, 166; *Jeans v. Jeans*, 3 Har. (Del.) 136; *Sheafe v. Sheafe*, 9 Fost. (N. H.) 269. See,

<sup>6</sup> *Taylor v. Taylor*, 25 O. St. 71; *Cox v. Cox*, 19 O. St. 502; *Tappan v. Tappan*, 6 O. St. 64; *Bascom v. Bascom*, 7 O. (part 2), 125; *Laughery v. Loughery*, 15 O. 404; *Price v. Price*, 10 O. St. 315; *Reed v. Reed*, 17 Q. St. 564; *Boggess v. Boggess*, 4 Dana, 307; *Maguire v. Maguire*, 7 Dana, 181; *Thornberry v. Thornberry*, 4 Litt. 251; *Whitney v. Whitney*, 7 Bush (Ky.), 520; *Pence v. Pence*, 6 B. Mon. 496; *Bourne v. Simpson*, 9 B. Mon. 454; *Woolfolk v. Woolfolk* (Ky.), 29 S. W. 742; *Beall v. Beall*, 80 Ky. 675; *Davis v. Davis*, 86 Ky. 32. The right to appeal is now denied in Indiana. See *Keller v. Keller* (Ind.), 38 N. E. 337; *McJunkin v. McJunkin*, 3 Ind. 30; *McQuigg v. McQuigg*, 13 Ind. 294; *Ewing v. Ewing*, 24 Ind. 468; *Wooley v. Wooley*, 12 Ind. 663.

was granted upon which one of the parties contracts new relations and a third party acquires rights, it cannot be that a process could be had to reverse a decree, the consequence of which would be the severance of all those new relations. Such anomalous mischief cannot be engrafted on the practice of our courts except by "clear and legislative enactment."<sup>1</sup> The answer to this objection is that a party "has no right to contract another marriage until he obtains a final decree of divorce, and this, in case of an appeal, cannot be had until the determination of the appeal."<sup>2</sup> The right to appeal is perhaps more valuable in actions for divorce than in other actions, for not only property rights are involved, but also the more important rights of remarriage and the custody of children. The interest of the state is best protected by permitting either party to appeal and have the case reviewed in the appellate court. Without the right to appeal an innocent party may be greatly wronged by an erroneous decree, which could not be reversed.<sup>3</sup> The time within which an appeal can be taken should be limited to a much shorter period than is allowed in other cases, and such seems to be the tendency of modern legislation.<sup>4</sup> A statute prohibiting appeal in actions for divorce may be unconstitutional where the state constitution permits the right to appeal in all civil cases.<sup>5</sup>

But see later cases: *Willman v. Willman*, 57 Ind. 500; *Sullivan v. Learned*, 49 Ind. 252; *Harrell v. Harrell*, 39 Ind. 185; *Cochnower v. Cochnower*, 27 Ind. 253. For the right to review by error or appeal in Missouri, see *State v. Kansas City Ct. of Ap.*, 104 Mo. 419, 16 S. W. 415; *Hansford v. Hansford*, 34 Mo. Ap. 262; *Salisbury v. Salisbury*, 92 Mo. 683, 4 S. W. 717; *Golding v. Golding*, 74 Mo. 123; *Nichols v. Nichols*, 39 Mo. Ap. 291; *Childs v. Childs*, 11 Mo. Ap. 395.

<sup>1</sup> *Bascom v. Bascom*, 7 O. (part 2),

125. See similar argument in *Lucas v. Lucas*, 69 Mass. 136, in which the right of review is denied.

<sup>2</sup> *Brotherton v. Brotherton*, 12 Neb. 72.

<sup>3</sup> See *Davis v. Davis*, 86 Ky. 32, 4 S. W. 822.

<sup>4</sup> See statutes limiting time for appeal. *Pennegar v. S.*, 3 Pick. 244, 10 S. W. 305; *Hemphill v. Hemphill*, 38 Kan. 220; *Wilhite v. Wilhite*, 41 Kan. 154, 21 P. 174. See interpretation of this statute in *Locke v. Locke* (R. I.), 30 A. 422.

<sup>5</sup> *Tierney v. Tierney*, 1 Wash.

An appeal will not lie unless a decree is rendered.<sup>1</sup> A mere order overruling a motion for nonsuit is not appealable.<sup>2</sup> An order vacating an order for temporary alimony, entered after an order for a decree, is not a final order.<sup>3</sup> Where by stipulation the issues in a divorce suit are tried by a jury and a judgment entered on the verdict ordering that the bonds of matrimony be dissolved, but reserving all questions relating to alimony and custody of the children to be determined upon a future hearing, the order is interlocutory and not final.<sup>4</sup> An order vacating or modifying a decree of divorce is, of course, a final order disposing of the case.<sup>5</sup> The decision of a lower court on the ruling of a master will not ordinarily be reviewed on appeal.<sup>6</sup> A decree of divorce will not be disturbed where the only question raised on appeal is the allowance of alimony.<sup>7</sup> The failure of one party to appeal from decree determining the issues of her cross-bill will not preclude her from resisting the claim of the other party.<sup>8</sup> The interest of the state requires that the record be examined and the appellant defeated if he has not established a case. This reason is sometimes overlooked and the whole record is not examined unless there has been a cross-appeal.<sup>9</sup> Generally an appeal should be dismissed where the appellant has availed himself of the benefits of the decree; and this is especially true where, pending an appeal, the appellant has married another.<sup>10</sup> Orders granting or refusing an allowance of temporary alimony and

Ter. 568; *Simpson v. Simpson*, 25 Ark. 487.

<sup>1</sup> *Pearson v. Pearson*, 7 Peck, 22, overruling *Pillow v. Pillow*, 13 Tenn. 420.

<sup>2</sup> *Christie v. Christie*, 53 Cal. 26.

<sup>3</sup> *McNevin v. McNevin*, 63 Cal. 186.

<sup>4</sup> *Lake v. King*, 16 Nev. 215. See, also, *Hunter v. Hunter*, 100 Ill. 519; *Knowlton v. Knowlton*, 40 Ill. Ap. 588. But see *contra*, *Shaw v. Shaw*, 9 Mich. 164.

<sup>5</sup> *O'Brien v. O'Brien*, 19 Neb. 584, 27 N. W. 640.

<sup>6</sup> *Pullen v. Pullen*, 41 N. J. Eq. 417.

<sup>7</sup> *Ensler v. Ensler*, 72 Ia. 159.

<sup>8</sup> *Nadra v. Nadra*, 79 Mich. 591, 44 N. W. 1046.

<sup>9</sup> *Hoff v. Hoff*, 48 Mich. 281. See, also, *Birkby v. Birkby*, 15 Ill. 120.

<sup>10</sup> *Garner v. Garner*, 38 Ind. 139; *Stephens v. Stephens*, 51 Ind. 542. See, also, *Baylies, New Trials and Appeals*, 18, on waiver of appeal.

suit money;<sup>1</sup> or fixing property rights;<sup>2</sup> or granting the custody of children,<sup>3</sup> are final orders subject to review. Such orders are not merely interlocutory, because they are in the nature of judgments, and, no matter how erroneous or oppressive, may be enforced by execution, attachment, injunction or proceedings in contempt. The right to have such order reviewed on error or appeal would afford the party no relief, since years might and generally do elapse before a final decision can be reached, and in the meantime valuable rights may be violated. This is, however, a controverted question, and other authorities maintain that such orders cannot be reviewed until a final decree upon the merits has been rendered.<sup>4</sup> The question is sometimes regulated by the code, and it seems that such orders are final orders within its definition. But some of the courts place a different and perhaps erroneous construction on the code provisions, and hold that such orders do not involve the merits of the case and are not final.<sup>5</sup> While such order is a step in the proceeding not involving the merits of the controversy, it is, nevertheless, a money judgment as final as any judgment at law, and may be enforced at once unless an appeal is permitted.

For abatement of appeal on the death of one party, see § 729a.

<sup>1</sup>Sharon *v.* Sharon, 67 Cal. 185; Lochnane *v.* Lochnane, 78 Ky. 467; White *v.* White, 86 Cal. 216, 24 P. 1030; Hecht *v.* Hecht, 28 Ark. 92; Golding *v.* Golding, 74 Mo. 123; Blake *v.* Blake, 80 Ill. 532; Foss *v.* Foss, 100 Ill. 576; Foote *v.* Foote, 22 Ill. 425; Casteel *v.* Casteel, 38 Ark. 477; Blair *v.* Blair, 74 Ia. 311, 37 N. W. 385; Williams *v.* Williams, 29 Wis. 517; Reed *v.* Reed, 17 O. St. 563; King *v.* King, 38 O. St. 370; Graves *v.* Graves (Ohio), 83 N. E. 720.

<sup>2</sup>Lake *v.* Lake, 17 Nev. 230, 30 P. 878; Storzynski *v.* Storzynski (Cal.),

31 P. 1130; Boyd *v.* Boyd (Cal.), 31 P. 1108.

<sup>3</sup>Pittman *v.* Pittman, 3 Or. 472; Irwin *v.* Irwin (Ky.), 28 S. W. 664; Laplin, *In re* (La.), 8 So. 615. See *contra*, Price *v.* Price, 55 N. Y. 656; Rogers *v.* Rogers (O.), 36 N. E. 310; Thomson *v.* Thomson, 5 Utah, 401. 16 P. 400; Waring *v.* Waring, 100 N. Y. 570.

<sup>4</sup>Call *v.* Call, 65 Me. 407; Russell *v.* Russell, 69 Me. 336; Sparhawk *v.* Sparhawk, 120 Mass. 390; Ross *v.* Ross, 47 Mich. 186; Cooper *v.* Mayhew, 40 Mich. 528. See, also, Haywary *v.* Hayward (Md.), 26 A. 537.

<sup>5</sup>Aspinwall *v.* Aspinwall, 18 Neb. 463, 25 N. W. 623; Wyatt *v.* Wyatt,

The amount of alimony to be allowed is of course within the discretion of the court, and the exercise of that discretion will not be reviewed; but where the facts are such that on general principles of equity the wife is not entitled to alimony, the question is not one of discretion but of law, and is subject to review by the appellate court.<sup>1</sup> It then becomes a question of power in the lower court, for where there is no power there is no discretion.<sup>2</sup> Ordinarily the appellate court will not interfere with the award of permanent alimony made by the trial court unless there has been a clear and manifest abuse of discretion.<sup>3</sup>

If the trial court has evidently overlooked some important element in computing the amount of alimony, so that the amount awarded the wife is manifestly too small, or otherwise inequitable, the appellate court may modify the decree and increase the amount. But as the condition of the parties and the value of property may have changed during the appeal, the safest course is to reverse the order for further proceedings in accordance with the opinion.<sup>4</sup>

While the amount of property which may be awarded to the wife in lieu of alimony is left to the discretion of the trial court, the decree may be reviewed on appeal, and the

<sup>2</sup> Idaho, 219, 10 P. 228; *Earles v. Earles*, 26 Kan. 178. Ind. 159; *Simons v. Simons*, 107 Ind. 197; *Henderson v. Henderson*, 110 Ind. 316; *Eastes v. Eastes*, 79 Ind. 363; *Peck v. Peck*, 113 Ind. 168, 15 N. E. 12; *Mercer v. Mercer*, 114 Ind. 558; *Stewartson v. Stewartson*, 15 Ill. 145; *Davis v. Davis*, 36 Ill. Ap. 643; *Lane v. Lane*, 22 Ill. Ap. 529; *Lind v. Lind*, 37 Ill. Ap. 178; *Wooley v. Wooley*, 24 Ill. Ap. 431; *Campbell v. Campbell*, 73 Ia. 482, 35 N. W. 522; *Wagner v. Wagner*, 39 Minn. 394, 40 N. W. 360; *Cowan v. Cowan*, 10 Colo. 540, 16 P. 215; *Wyatt v. Wyatt*, 2 Idaho, 219, 10 P. 228.

<sup>1</sup> *Collins v. Collins*, 71 N. Y. 269. <sup>2</sup> *Kennedy v. Kennedy*, 73 N. Y. 369; *Brinkley v. Brinkley*, 50 N. Y. 184; *Townsend v. Hendricks*, 40 How. 143, 161. See, also, Appeal from order for temporary alimony, § 862. Temporary alimony on appeal, see § 863. Attorney fees on appeal, §§ 879, 880. Appeal from order relating to custody and support of children, see § 984.

<sup>3</sup> *Douglas v. Douglas*, 81 Ia. 258, 47 N. W. 92; *Rossmann v. Rossmann*, 62 Mich. 429; *Cleghorn v. Cleghorn*, 66 Cal. 309; *Buckles v. Buckles*, 81

<sup>4</sup> *Yost v. Yost* (Ind.), 41 N. E. 11.

amount changed, where there has been an abuse of discretion or a mistake of law or fact.<sup>1</sup> Ordinarily the decree is not disturbed; but there are many instances in the reported cases where decrees dividing the property have been changed by the appellate courts.<sup>2</sup> The decree of distribution may be reviewed in some states without an appeal from the decree of divorce. If the supreme court should arrive at the conclusion that the divorce should have been denied, the decree of distribution may be changed, and the defendant awarded the property.<sup>3</sup> In some states the supreme courts have no jurisdiction to disturb a decree of divorce; but in such cases the distribution of property or the amount of alimony can be changed.<sup>4</sup> Where the decree of the lower court was clearly erroneous, the decree cannot be reversed, but the innocent wife will be allowed alimony.<sup>5</sup> When the amount is excessive, or the trial court has overestimated the husband's means or the wife's necessities, or the decree is burdensome or inequitable in view of the circumstances of the case, the decree will be reduced or modified by the appellate court.<sup>6</sup> Or, where alimony is denied, the reviewing court may remand the cause for further proof and direct the lower court to award alimony.<sup>7</sup> An examination of the cases last cited will show that the reviewing courts exercise considerable freedom in modifying decrees for alimony. Such decrees

<sup>1</sup> *Robinson v. Robinson*, 26 Tenn. 440. *ilton*, 37 Mich. 603; *Ross v. Ross*, 78 Ill. 402; *Cowan v. Cowan*, 16 Colo. 335, 26 P. 934; *Hickling v. Hickling*, 40 Ill. Ap. 73; *Turner v. Turner*, 80 Cal. 141; *Rourke v. Rourke*, 8 Ind. 427; *Robinson v. Robinson*, 26 Tenn. (7 Humph.) 440; *Williams v. Williams*, 6 N. Y. Supp. 645; *Hardy v. Hardy*, 6 N. Y. Supp. 300; *Sleeper v. Sleeper*, 65 Hun, 454, 20 N. Y. Supp. 337; *Small v. Small*, 28 Neb. 843, 45 N. W. 248.

<sup>2</sup> *Bovo v. Bovo*, 63 Cal. 77; *Eslinger v. Eslinger*, 47 Cal. 62; *Eidenmuller v. Eidenmuller*, 37 Cal. 364; *Brown v. Brown*, 60 Cal. 579. See, also, *Kashaw v. Kashaw*, 3 Cal. 312.

<sup>3</sup> *Ensler v. Ensler*, 72 Ia. 159.

<sup>4</sup> *Pence v. Pence*, 6 B. Mon. 496.

<sup>5</sup> *Davis v. Davis*, 86 Ky. 32, 4 S. W. 822.

<sup>6</sup> *Ensler v. Ensler*, 72 Ia. 159, 33 N. W. 384; *Andrews v. Andrews*, 69 Ill. 609; *McGrady v. McGrady*, 48 Mo. Ap. 668; *Hamilton v. Ham-*

<sup>7</sup> *Reynolds v. Reynolds*, 92 Mich. 104.

are not to be accredited as the ordinary findings of a trial court; for there may be both errors of computation and of findings of fact, where the evidence is conflicting, as well as errors of law. Whether under the circumstances alimony should be granted is a matter of law. The amount that should be granted is a matter of discretion. To modify or reverse the order for alimony the appellate court should review the whole testimony relating to the conduct of the parties, for the amount awarded by the trial court may have been influenced by the conduct of the parties, and other circumstances disclosed in the evidence on the trial of the cause for divorce. Ordinarily the decree for alimony is not disturbed when the evidence is conflicting and the order is not manifestly inequitable.

The appeal generally brings the case up to the appellate court for trial *de novo*, but such court will treat the finding of the court as equal to the verdict of a jury and will not disturb either where the evidence is conflicting and contradictory, although the reviewing court might reach different conclusions of fact.<sup>1</sup> In such case the appellate court should be fully convinced that the lower court, with all its advantages for ascertaining the truth, has rendered a decree without sufficient evidence.<sup>2</sup> Where the charge of adultery is not sustained by direct proof, and the finding of the court is based upon inferences drawn from circumstances, the reviewing court will examine the evidence to ascertain whether the circumstances warrant the inferences. The judgment will be reversed if the evidence is insufficient, for such evidence is, in the eye of the law, no evidence.<sup>3</sup> The rule that

<sup>1</sup>Gibbs *v.* Gibbs, 18 KAN. 419; 142 Ill. 374, 30 N. E. 672; Corrie *v.* Powers, 20 Neb. 529; Corrie, 46 Mich. 235; Darrow *v.* Callahan, 7 Neb. 38; Darrow, 159 Mass. 262, 34 N. E. 270. Fuller *v.* Fuller, 17 Cal. 605; McGonegal *v.* McGonegal, 46 Mich. 66; 2 Nicholas *v.* Nicholas, 50 Mich. 162. Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948; Ayers *v.* Ayers, 41 Ill. Ap. 226, 3 Pollock *v.* Pollock, 71 N. Y. 137.

the verdict of a jury will not be disturbed where there is some evidence to support it does not apply to actions for divorce. The judge must be satisfied the cause for divorce is proven by sufficient and satisfactory evidence.<sup>1</sup> The decree of divorce may be affirmed, and the portion of the decree relating to alimony may be modified or reversed and remanded to the lower court for a new trial.<sup>2</sup>

<sup>1</sup> Paulson v. Paulson (Tex.), 21 S. W. 778.    <sup>2</sup> Reynolds v. Reynolds, 92 Mich. 104.

## PROCESS AND CONSTRUCTIVE SERVICE.

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§ 815. Process or summons.

816. Waiver of process.

817. Constructive service.

818. Defective service, when void.

819. The affidavit of non-residence.

820. Sheriff's diligence before publication.

§ 821. The notice.

822. Mailing copy of summons and petition to defendant.

823. Proof of publication.

824. Personal service out of the state.

825. Decree based on constructive service, how vacated.

**§ 815. Process or summons.**—The process in divorce suits is the same as in other suits unless the statute contains some special provision relating to the subject. In every case the provisions of the local statute must be followed, otherwise the service is void and the court will have no jurisdiction to render a decree. The sufficiency of personal service upon the defendant in a divorce suit need not be noticed here, as it would involve questions of local practice and the interpretation of statutes which are changing from time to time. The cases cited below may be consulted.<sup>1</sup> The practice as to the form and service of the summons or subpoena is generally the same as the chancery practice where the divorce suit is classed as a suit in equity.<sup>2</sup> Where the statutes relating to divorce contain no special provision con-

<sup>1</sup> *Spafford v. Spafford*, 16 Vt. 511; *Harter v. Harter*, 5 O. 318; *Smith Leavitt v. Leavitt*, 135 Mass. 191; *v. Smith*, 6 Mass. 36; *Houston v. Phelps v. Phelps*, 7 Paige, 150; *Lyon Houston*, 3 Mass. 159; *Rochester v. v. Lyon*, 21 Conn. 185; *Temple v. Temple*, 81 Tenn. 160; *Brown v. Brown*, 15 Mass. 389; *Wanamaker Houston*, 3 Mass. 159; *Rochester*, 1 Or. 307; *Young v. Phelps*, 7 Paige, 150; *Young*, 18 Minn. 72, 90; *Shetzler v. Shetzler*, 2 Edw. Ch. 584; *Dunn v. Dunn*, 4 Paige, 425; *Bratton v. Bratton*, 79 Ind. 588. *Fillman's Appeal*, 99 Pa. 286; <sup>2</sup> *Welch v. Welch*, 16 Ark. 527.

cerning the notice in divorce suits, the summons must conform to the statutes or provisions of the code relating to suits in general, and must be indorsed and served as other summons.<sup>1</sup> The indorsement must show the nature of the relief demanded; as, "suit for a divorce from the bonds of matrimony;" or, "action for divorce and alimony;" or, "action for a separation." Where the statute directs that the summons in an action for divorce is required to be indorsed as follows: "Action to annul a marriage;" or, "action for a divorce;" or, "action for a separation," according to the relief demanded, the indorsement "action for a divorce" on a summons in a suit for a separation will not render the order for alimony void, but is a mere irregularity, of which a defendant, who has permitted a default to be entered against him, cannot complain unless he was prejudiced thereby.<sup>2</sup> Actual notice should be given the defendant if possible, especially if he is a resident of the state.<sup>3</sup> A failure to give actual notice to a non-resident, where no reason appears for not doing so, is a suspicious circumstance which may warrant a dismissal of the case where the evidence is not satisfactory in some respects.<sup>4</sup> As in other cases, a general appearance in the divorce suit is a waiver of any defects in the process or its service.<sup>5</sup> Where there has been no service of process, either actual or constructive, and no appearance by defendant, the court has no jurisdiction, and it is error to render judgment.<sup>6</sup>

**§ 816. Waiver of process.**—It is not an evidence of collusion for the defendant to waive the issuance of process or to accept service of it, but it opens the way for fraud. The court should be satisfied that such waiver is genuine, and

<sup>1</sup> *Brown v. Brown*, 10 Neb. 349. 223; *Johnson v. Johnson*, 12 Bush,

<sup>2</sup> *Rudolph v. Rudolph*, 19 Civil 485; *White v. White*, 60 N. H. 210; Pro. 424, 12 N. Y. Supp. 81. *Jones v. Jones*, 108 N. Y. 415.

<sup>3</sup> *Labotiere v. Labotiere*, 8 Mass. 383; *Smith v. Smith*, 9 Mass. 422; *Randall v. Randall*, 7 Mass. 502. <sup>6</sup> *Champon v. Champon*, 40 La. An. 28; *Jurgielwiez v. Jurgielwiez*, 24 La. An. 77; *Townsand v. Townsand*, 21 Ill. 540.

<sup>4</sup> *Clark v. Clark*, 48 Mo. Ap. 157.

<sup>5</sup> *Stanbridge v. Stanbridge*, 31 Ga.

that the signature of the defendant was not obtained by force or fraud.<sup>1</sup> Ordinarily the acceptance of service is good evidence that the defendant has notice of the suit, and is equal to an appearance in the suit.<sup>2</sup> In New Jersey the acknowledgment of service of a copy of the citation in a divorce suit is not sufficient unless the defendant is served with a copy of the petition and also enters his appearance.<sup>3</sup> A written admission of service and an agreement to "waive any other service" was held insufficient where the defendant was not a resident of the state, and the required order of publication had not been obtained.<sup>4</sup>

**§ 817. Constructive service.**—Every state has the power to regulate the domestic relations and determine the civil *status* of its inhabitants, and this involves the power to authorize and prescribe the manner of obtaining jurisdiction in a suit to change the marital relation of a party who resides in the state, although personal service cannot be had upon the other party to the marriage. "The state," says Justice Field in *Pennoyer v. Neff*,<sup>5</sup> "has absolute right to prescribe the conditions upon which the marriage relations between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties, guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is permitted. The complaining party would fail if a divorce were sought in the state of defendant, and if application cannot be made to the tribunals of complainant's domicile in such case, and proceedings be there instituted without personal service of process, or personal notice to the offending party, the injured citizen would be without redress."<sup>6</sup>

<sup>1</sup> *Rouse v. Rouse*, 47 Ia. 422; *Willman v. Willman*, 57 Ind. 500.

<sup>2</sup> *Keeler v. Keeler*, 24 Wis. 522.

<sup>3</sup> *Stone v. Stone*, 25 N. J. Eq. 445.

<sup>4</sup> *Weatherbee v. Weatherbee*, 20 Wis. 499. This case is wrong in principle, since the defendant had actual notice, and waived the order

of publication. See criticism in *Van Fleet*, Col. At., § 466. See *Wright v. Mahaffey*, 76 Ia. 96, 40 N. W. 112.

<sup>5</sup> 95 U. S. 714.

<sup>6</sup> See, also, *Hunt v. Hunt*, 72 N. Y. 217; *Thompson v. Thompson*, 91 Ala. 591; *King v. King*, 84 N. C. 32.

One state cannot invade the jurisdiction of another to serve its process therein and compel the non-resident to appear before its tribunals and have his rights determined by its own laws. This being true, a party guilty of a cause for divorce might avoid a dissolution of the marriage by deserting and remaining in another state. A wife who is guilty of adultery might avoid divorce and loss of dower by removing to another state. Her husband could not obtain personal service on her, and would be compelled to submit to the double wrong of adultery and desertion. The interest of the state and good public policy require that the marriage relation be dissolved where the parties refuse to live together and to perform the duties of the marriage. Parties who live in separation are apt to contract secret marriages or indulge in the grossest immoralities, and instead of maintaining a home and rearing children become the cause of public scandal and a menace to public morals. The deserted party has a right to free herself from a *status* which will prevent her from marrying again, and to enforce this right the state has found it expedient to dissolve the marriage in certain cases, although the defendant is a non-resident. In order to do this the proceeding is made public, and a substituted service is provided for to notify the defendant, if possible, that the divorce will be granted for certain causes and on a certain day, unless he appears and defends. "The right of the legislature to prescribe such notice and to give it effect as a process rests upon the necessity of the case, and has long been recognized and acted upon."<sup>1</sup> The statutes authorizing constructive service in all cases where the defendant is a non-resident include suits for divorce.<sup>2</sup> In states where divorce suits follow the equity practice, constructive service may be had as in equity cases.<sup>3</sup>

<sup>1</sup> Cooley's Const. Lim. 403. For nature and effect of the decree of divorce in proceeding *in rem*, see §§ 5, 27, 32.

<sup>3</sup> Temple *v.* Temple, 81 Tenn. 160; Lawrence *v.* Lawrence, 73 Ill. 577; McJunkin *v.* McJunkin, 3 Ind. 30; Smith *v.* Smith, 20 Mo. 166.

<sup>2</sup> Lewis *v.* Lewis, 15 Kan. 181; Hare *v.* Hare, 10 Tex. 355.

If the defendant is a resident of a foreign country, the practice is the same as though such party resided in another state.<sup>1</sup>

**§ 818. Defective service, when void.**—It has generally been held that the requirements of the statutes for imparting notice must be strictly followed, otherwise the decree of divorce is void and open to collateral attack in any proceeding.<sup>2</sup> And it has been the fashion in the last generation to pick out some small defect in the preliminary steps that must precede the published notice, or some minor technicality in the notice or in the proof that it was published a sufficient length of time, and overturn the decree, regardless of the merits of the case and regardless of the fact that the defendant was a non-resident as alleged. Great injustice has been done to innocent parties who have acquired rights under such decrees. Titles have been overturned, securities destroyed and other property rights disturbed. Even the home and the marriage relation, ordinarily guarded by every intendment and presumption of our law, have been destroyed by so simple a thing as a mistake in a preliminary affidavit. The absent party who has deserted and neglected all his marital duties and acquiesced in the decree has been allowed to destroy a happy second marriage, to bastardize the children and wreak a most enduring revenge by securing a conviction of his former partner on a charge of bigamy. The only reason which can be given for holding a decree void where there has been a defective but substantial compliance with the statute is that the statute directs certain things to be performed in a certain manner, and if the court has proceeded without these prerequisites it has acted without due process of law.<sup>3</sup> This is only true where the defendant appears in that proceeding and demands his rights. But if the defendant is a non-resident, the object of the statute is fully attained if a proper notice is actually published during the required time. Suppose all the preliminaries before the publication have not been complied with, the notice will give

<sup>1</sup> *Trevino v. Trevino*, 54 Tex. 261.

<sup>3</sup> *Morey v. Morey*, 27 Minn. 265.

<sup>2</sup> *Reno on Non-residents*, § 254.

the public and the defendant the same information. Such defects and irregularities have been held to be sufficient to deprive the court of jurisdiction and render the decree of divorce void.<sup>1</sup> But the correct interpretation of such statutes is believed to be that their provisions are directory and are satisfied with a substantial compliance which fully informs the public of the pendency of the suit and the nature of the relief demanded, and that such irregularities and errors are cured by the decree of the court.<sup>2</sup> And this seems to be in conformity with recent adjudications where decrees of divorce were attacked in collateral proceedings.<sup>3</sup>

In every case where there has been constructive service and the defendant has not appeared, the court should not proceed to hear the plaintiff's evidence until it is satisfied by a personal examination of the record and the filings in the case that every requirement of the statute has been complied with, and that proof of such compliance is entered on the records of the court. This duty should not be performed in a hasty and perfunctory manner, as is generally the case where a court is hearing *ex parte* applications and entering defaults. The question of jurisdiction is vital and all-important in decrees of divorce. Ordinary decrees affect only the parties to the suit, but the decree of divorce is far reaching. It will not only dissolve the marriage relation but will de-

<sup>1</sup> Atkins *v.* Atkins, 9 Neb. 191; Godfrey *v.* Godfrey, 27 Ga. 466; Werner *v.* Werner, 30 Ill. Ap. 159; Stone *v.* Stone, 25 N. J. Eq. 445. Collins *v.* Collins, 80 N. Y. 1; Morey *v.* Morey, 27 Minn. 265; Beach *v.* Beach, 6 Dak. 371, 43 N. W. 701; Wortman *v.* Wortman, 17 Abb. Pr. 66; Burton *v.* Burton, 45 Hun, 68; Cheeley *v.* Clayton, 110 U. S. 701, 4 S. C. R. 328; McBlain *v.* McBlain, 77 Cal. 507, 20 P. 61. See, also, divorce cases requiring strict performance of the statutory requirements. Smith *v.* Smith, 4 Ia. 266; Pinkney *v.* Pinkney, 4 Ia. 324; Plummer *v.* Plummer, 37 Miss. 185;

<sup>2</sup> See Van Fleet, Col. At., §§ 329 and 330. See, also, Cason *v.* Cason, 31 Miss. 578; Banta *v.* Wood, 32 Ia. 469; Ward *v.* Lowndess, 96 N. C. 367, 2 S. E. 591.

<sup>3</sup> Carr's Adm'r *v.* Carr, 92 Ky. 552, 18 S. W. 453; *In re Newman*, 75 Cal. 213, 16 P. 889; Hemphill *v.* Hemphill, 38 Kan. 220, 16 P. 457; Calvert *v.* Calvert, 15 Colo. 390, 24 P. 1043; Ensign *v.* Ensign, 45 Kan. 612, 26 P. 7; Anthony *v.* Rice, 110 Mo. 223, 19 S. W. 423.

termine the rights of heirs for several generations; the title of the husband and the wife to the real estate which they own or may acquire during the life-time of both; the legitimacy of children of a subsequent marriage; the *status* and property rights of a second wife, and the liability of the parties to the subsequent marriage to a prosecution for bigamy. These rights and liabilities are before the court, though the parties themselves are not. Every precaution should be observed, therefore, to see that all the preliminary requirements have been complied with, that a sufficient notice has been published for the required length of time in a paper of general circulation, and that proof of such publication appears in the record. If such proceedings are defective or irregular, the court must continue the cause until a valid service is obtained.<sup>1</sup> But if the proceedings are regular the court must proceed to take the proofs.<sup>2</sup>

**§ 819. The affidavit of non-residence.**—The statutes require the fact that the defendant is a non-resident to appear in the record, either in the allegations of the petition,<sup>3</sup> or by an affidavit that personal service cannot be made on the defendant within the state.<sup>4</sup> Such affidavit is jurisdictional, being the foundation of the constructive service; and it is held that a decree obtained without such affidavit will render the proceedings erroneous, although all the subsequent requirements have been complied with, and the notice has been duly published.<sup>5</sup> The omission of any material allegation from the affidavit will render the service void.<sup>6</sup>

Chase *v.* Chase, 61 N. H. 123.

<sup>2</sup> King *v.* King, 84 N. C. 32; Stanbridge *v.* Stanbridge, 31 Ga. 223; Rogers *v.* Rogers, 18 N. J. Eq. 445.

<sup>3</sup> Anon., 5 Mass. 196; Mace *v.* Mace, 7 Mass. 212; Choate *v.* Choate, 3 Mass. 391; Phelps *v.* Phelps, 7 Paige, 150; Bland *v.* Bland, 3 P. & M. 233.

<sup>4</sup> Morrison *v.* Morrison, 64 Mich. 53, 30 N. W. 903.

<sup>5</sup> Parish *v.* Parish, 32 Ga. 653; Atkins *v.* Atkins, 9 Neb. 191. See *contra*, Sweely *v.* Van Steenburg, 69 Ia. 696, 26 N. W. 78; Van Fleet on Col. At., § 341, and reasons given in the preceding section.

<sup>6</sup> Atkins *v.* Atkins, 9 Neb. 191; Beach *v.* Beach, 6 Dak. 371, 43 N. W. 701; Wortman *v.* Wortman, 17 Abb. Pr. 66. See, also, as sustaining text, Harris *v.* Chaflin, 36

The failure to show that any diligence was used to ascertain defendant's residence renders the affidavit fatally defective if such allegation is required by statute.<sup>1</sup> But minor defects and the omission of allegations that do not affect the jurisdiction of the court will not render the decree void, although the statute has not been strictly followed.<sup>2</sup> The affidavit should contain sufficient facts to show that the cause of action is one in which constructive service may be had, but it need not contain a complete statement of a cause of action.<sup>3</sup>

The rule by which the sufficiency of the affidavit of non-residence is determined is stated as follows: "If there is a total want of evidence upon a vital point in the affidavit the court acquires no jurisdiction by publication of the summons; but where there is not an entire omission to state some material fact, but it is insufficiently set forth, the proceedings are merely voidable."<sup>4</sup>

Kan. 543, 13 P. 830; *Towsley v. McDonald*, 32 Barb. 604; *Manning v. Heady*, 64 Wis. 630, 25 N. W. 1; *Drysdale v. Biloxi Canning Co.*, 67 Miss. 534, 7 So. 541; *Von Rhade v. Von Rhade*, 2 T. & C. (N. Y.) 491.

<sup>1</sup> *Yorke v. Yorke* (N. Dak.), 55 N. W. 1095.

<sup>2</sup> *Carr's Adm'r v. Carr*, 92 Ky. 552, 18 S. W. 453; *Hynes v. Oldham*, 3 B. Mon. 266; *Stegall v. Huff*, 54 Tex. 193.

<sup>3</sup> *Calvert v. Calvert*, 15 Colo. 390, 24 P. 1043. See forms of affidavit in *Shedenhelm v. Shedenhelm*, 21 Neb. 387; *Donnelly v. West*, 66 How. Pr. 428; *O'Connell v. O'Connell*, 10 Neb. 390. Compare *Atkins v. Atkins*, 9 Neb. 191, 2 N. W. 466, and *Claypoole v. Houston*, 12 Kan. 324. See, also, *Shields v. Miller*, 9 Kan. 390; *Harris v. Chafin*, 36 Kan. 543, 13 P. 830; *Essig v. Lower*, 120 Ind. 239, 21 N. E. 1090; *Carrico*

*v. Tarwater*, 103 Ind. 86, 2 N. E. 227; *Forbes v. Hyde*, 31 Cal. 342. Although the affidavit of plaintiff's attorney may be valid, as was held in *O'Connell v. O'Connell*, 10 Neb. 390, the safest course for the attorney is to require the plaintiff to make the affidavit. See proceedings in *Morton v. Morton*, 16 Colo. 358, 27 P. 718. In New York, an order of publication cannot be obtained upon the plaintiff's affidavit alone. Other proof that defendant is a non-resident is required. *Hall v. Hall*, 10 N. Y. Supp. 228.

<sup>4</sup> *Atkins v. Atkins*, 9 Neb. 191. Section 78 of the Nebraska Code provides that, "before service can be made by publication, an affidavit must be filed that service of summons cannot be made within this state on the defendant or defendants to be served by publication, and that the case is one of

**§ 820. Sheriff's diligence before publication.**— Before service by publication can be made in Colorado, the statute requires the "usual exertion on the part of the sheriff to serve the summons." The object of this statute is to obtain a personal service of the summons, if possible, during the life of the writ, and it is necessary that the sheriff should retain the writ until return day.<sup>1</sup> And it is held by the courts of that state that unless this is done the subsequent publication of notice will not confer jurisdiction on the court to render a decree.<sup>2</sup> Such decree is absolutely void and subject to collateral attack, and is not rendered valid because it was not attacked within the statutory time for

those mentioned in the preceding section." Section 79 requires the notice to specify when defendants are required to answer. In this case the affidavit stated that the "cause is one of those mentioned in section 77," but did not state the nature of the cause of action. The summons published did not notify the defendant the date when she would be required to answer, but notified her that unless she answered on or before a certain day "the petition would be taken as true." It was held that the affidavit and notice were so defective that the court had no jurisdiction. It would seem that the affidavit was sufficient, for when read with the petition on file it disclosed that the action was a suit for divorce. The notice was in the usual form and disclosed when the defendant was required to answer. The record of this case discloses enough to sustain the jurisdiction of the court, as it was a substantial compliance with the statute.

The Code of Dakota (sec. 104)

provides that, "where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the territory, and that fact appeared by affidavit to the satisfaction of the court or judge thereof, . . . may grant an order that the service be made by the publication of a summons." The affidavit stated that defendant could not, after due diligence, be found within the territory, and that the affiant did not know her residence or whereabouts, and could not, by reasonable diligence, ascertain the same. It was held that the affidavit was insufficient and the decree void for want of jurisdiction, because the efforts to find defendant were not stated at length in the affidavit. *Beach v. Beach*, 6 Dak. 871, 43 N.W. 701. This ruling was not necessary to a determination of the case, as it appeared that the decree was obtained by fraud in concealing the proceedings from the wife.

<sup>1</sup> *Palmer v. Cowdry*, 2 Colo. 1.

<sup>2</sup> *Vance v. Maroney*, 4 Colo. 47.

setting such decree aside.<sup>1</sup> The same ruling was made in Michigan under similar facts.<sup>2</sup> Judge Cooley dissented and pointed out that the trial court had the right to determine the jurisdictional fact, that the defendant was a non-resident, from the return and other evidence before it. The statute did not require anything more than a showing that the process issued could not be served by reason of the absence of the defendant from the state. "I cannot think it possible," said he, "that it was ever intended jurisdiction of a case should depend upon a circumstance so entirely unimportant as that a subpoena which could not be served was left in the register's office before its return day, instead of being kept in the office of the sheriff or of the party." In all of the above cases the non-residence of the defendant, which is the jurisdictional fact authorizing the court to order publication, was shown by the record. This fact, and the publication of a notice otherwise valid, would seem to be sufficient to give the court jurisdiction regardless of minor defects in the proceedings before the notice.

**§ 821. The notice.**—The notice should conform to the order of publication, be directed to the defendant, informing him of the nature of the action and the time for appearance, and should fulfill all the statutory requirements.<sup>3</sup> A defective notice will not render the decree void unless the defect is such as to leave some material fact ambiguous and uncertain. If the time for appearance fixed by the notice does not give the defendant the full time allowed by statute, the decree is void and subject to collateral attack.<sup>4</sup> The court will not obtain jurisdiction if the notice is not published the required length of time.<sup>5</sup> As a defense to an in-

<sup>1</sup> *Clayton v. Clayton*, 4 Colo. 410; <sup>4</sup> *Morey v. Morey*, 27 Minn. 265, 6 of the action. *Shedenhelm v. Shedenhelm*, 21 Neb. 387.

<sup>2</sup> *Cheeley v. Clayton*, 110 U. S. 701, 4 S. C. R. 328. <sup>5</sup> *Tucker v. People*, 122 Ill. 583, 11 N. W. 783. But see *Van Fleet, Col. At.*, § 490, and cases cited.

<sup>3</sup> *Soule v. Hough*, 45 Mich. 418, 8 N. W. 50, 159. <sup>6</sup> *Bachelor v. Bachelor*, 1 Mass. 256.

<sup>4</sup> It need not state the cause for divorce, but must state the nature N. E. 765;

dictment for bigamy the defendant introduced a decree of divorce obtained upon constructive service, and which recited that the decree was rendered within thirty-five days after the first publication, while the statute required the first insertion to be at least forty days before the commencement of the term of court. Three years afterward this decree was amended so as to show a valid notice, but such amendment was made without notice to the defendant in the divorce proceeding. It was held that the decree and the amendment were void, having been rendered by a court without jurisdiction, and that the divorce thus obtained was no defense to the indictment.<sup>1</sup> A decree upon default rendered before the answer day fixed in the notice, although premature, is simply erroneous and not void. It can be corrected by an interested party on motion or by appeal, but is not subject to collateral attack.<sup>2</sup>

**§ 822. Mailing copy of summons and petition to defendant.**—It is sometimes required that in addition to the publication of summons the plaintiff shall mail to defendant a copy of such notice together with a copy of the petition, and it is held that the decree is void unless such copies are mailed.<sup>3</sup> This part of the service is not required if the plaintiff file an affidavit that defendant's residence is unknown. Such affidavit is not, however, a part of the service, but it simply furnishes proof to the court that the statute has been complied with as far as possible, and it may be filed at any time before the divorce is granted.<sup>4</sup> Where it is shown that a copy of the summons was mailed to defendant properly addressed, the defendant may show that she has received her mail at such address with uniform regularity for several

<sup>1</sup> *Tucker v. People*, 122 Ill. 583, 11 *v. Carr*, 6 Ia. 331; *Hallett v. Righters*, 13 How. Pr. 43; *Smith v. Wells*, N. E. 765.

<sup>2</sup> *In re Newman*, 75 Cal. 213; *Carr's Adm. v. Carr*, 92 Ky. 552, 18 *69 N. Y. 600.*  
S. W. 453.

<sup>3</sup> *Lewis v. Lewis*, 15 Kan. 181; *Odell v. Campbell*, 9 Oreg. 298; *Stone v. Stone*, 25 N. J. Eq. 445; *McGahen* <sup>4</sup> *Ensign v. Ensign*, 45 Kan. 612, 26 P. 7; *Larimore v. Knoyle*, 43 Kan. 338, 23 P. 487; *Hemphill v. Hemphill*, 38 Kan. 220, 16 P. 457.

years, and that no copy of the summons in the case ever reached her, and such proof will create the presumption that the postage on the letter containing the summons was not paid and that the letter was not mailed.<sup>1</sup> Where a court proceeded to render a divorce upon a false affidavit that the wife is a non-resident and her address is unknown, the decree is void, and the wife, upon an application for letters of administration in another state, may show that such affidavit was false, and that she was a resident of that state when the decree was rendered and her residence was known to the husband.<sup>2</sup> If the decree recites the mode by which the defendant was notified and does not recite that a copy of the notice was mailed to defendant as required by statute, there is no presumption that any other or further notice was given.<sup>3</sup> This defect is held to render the decree void, and is subject to collateral attack in another state in an action for separate maintenance.<sup>4</sup>

**§ 823. Proof of publication.**—The record of a proceeding based upon publication of summons should contain some proof of the publication. The affidavit of the editor, publisher or printer should state the dates of the first and last insertion of the notice and the number of publications. The absence of this affidavit does not render the judgment void if the record recites that the affidavit was filed.<sup>5</sup> Whether defects in the affidavit proving publication will render the judgment void is a controverted question not within the scope of this work. A reference to some of the authorities upon this point may be of some assistance.<sup>6</sup> After the de-

<sup>1</sup> *Morton v. Morton*, 16 Colo. 358, Ark. 384; *Dexter v. Cranston*, 41 27 P. 718. Mich. 448; *Gillett v. Needham*, 37

<sup>2</sup> *Stanton v. Crosby*, 9 Hun, 370. Mich. 143; *Palmer v. McCormick*,

<sup>3</sup> *Werner v. Werner*, 30 Ill. Ap. 28 Fed. 541; *White v. Bogart*, 73 N. 159. Y. 256; *Hahn v. Kelly*, 34 Cal. 391;

<sup>4</sup> *Id.* *Pierce v. Charleton*, 12 Ill. 358; *Hay-*

<sup>5</sup> *Ogden v. Walters*, 12 Kan. 282. *wood v. Collins*, 60 Ill. 328; *Fox v.*

<sup>6</sup> *Pettiford v. Zoellner*, 45 Mich. 358, 8 N. W. 57; *Steinbach v. Leese*, 27 Cal. 295; *Scott v. Pleasants*, 21 74 Cal. 400, 16 P. 197; *Roberts v.*

cree is rendered a defective affidavit of publication may be amended.<sup>1</sup>

**§ 824. Personal service out of the state.**—The defendant should have actual notice of the proceedings against him if possible. *Ex parte* divorces are often fraudulent, and an imposition upon the public and the defendant who has no opportunity to be heard. Such divorces may be obtained by a suppression of facts which would prevent the plaintiff from obtaining a decree. Modern legislation has provided many safeguards against secret divorces, such as requiring notice through the mails, the service upon defendant of a copy of the petition and summons, and the appointment of an attorney to notify defendant and represent him at the trial.<sup>2</sup> Many of the states provide that personal service may be had upon a non-resident in another state in lieu of publication of summons. Personal notice to a non-resident will give the decree such validity that it will be recognized in the state where the defendant resides as a valid adjudication of the *status* of both parties.<sup>3</sup> This form of notice is to be preferred because it is less expensive, and the most satisfactory proof that the defendant has actual notice of the proceeding. A decree based on such service is liable to direct attack only, and would only be set aside on a strong showing of fraud; and, the record being less complicated than other forms of service, the decree will seldom be liable to collateral attack. The statute providing for this form of constructive service should be liberally construed with a view to promote justice and give effect to its provisions.<sup>4</sup>

The failure to obtain an order of publication before ob-

Flanagan, 21 Neb. 503, 32 N. W. 563; Wood *v.* Blythe, 46 Wis. 650. Improper verification will render the judgment void. Stanton *v.* Ellis, 16 Barb. 319; Senicha *v.* Lowe, 74 Ill. 274. But see *contra*, Hart *v.* Grigsby, 14 Bush, 542; Mann *v.* Martin, 14 Bush, 763.

<sup>1</sup> *In re Newman*, 75 Cal. 213, 16 P. 887.

<sup>2</sup> *Butler v. Washington*, 45 La. An. 275, 12 So. 356.

<sup>3</sup> *Doughty v. Doughty*, 28 N. J. Eq. 581; *Williams v. Williams*, 53 Mo. Ap. 617.

<sup>4</sup> Personal service in a foreign country is a substantial compliance with this statute. *Green v. Green*, 13 Pa. Co. Ct. R. 671.

taining service upon a non-resident defendant has been held to render the decree void.<sup>1</sup> The only reason assigned was that the service was not in compliance with the statute.<sup>2</sup> This is an absurd ruling, giving great weight to a mere technicality which could in no way operate to the prejudice of the defendant who has notice of the proceedings. His remedy is to appear and have the service quashed at the cost of complainant.

The true rule in cases where there is some defect in the preliminary steps preceding the service is, that the court obtains jurisdiction by a substantial compliance with the statute, which is sufficient to warn the defendant that a suit is pending against him, and that such defects do not render the decree void.<sup>3</sup> The service will not be quashed before decree because the record does not show all the preliminary steps to obtain the notice and the authority of the officer who served it. "The object of the statute," it was said, "was to provide for an easier and less expensive method of effecting service on non-residents than by publication, and at the same time to make it certain that the defendant had full notice of the suit. To carry out these objects we must give the statute a liberal construction, disregard technicalities, and supply by intendment what the law, in other cases, would presume had been done. The defendant was a non-resident, and this authorized the service. The application for the notice will be presumed when it has been issued, and especially when it has been asked for in the petition. It is also a fair presumption that the party making the service is competent and disinterested until the contrary is proved, and the signature and seal of the officer to the jurat, as made in the present case, is as full and complete a certificate as is required by the statute."<sup>4</sup> Personal service beyond the

<sup>1</sup> *McBlain v. McBlain*, 77 Cal. 507, 20 P. 61.

<sup>2</sup> See, also, *dictum* in *Keeler v. Keeler*, 24 Wis. 522.

<sup>3</sup> In *Field*, *In re*, 131 N. Y. 189, 30 N. E. 48, the order directing service upon the non-resident de-

fendants by a proper personal service without the state was not in the alternative form as directed by statute, but this defect was not sufficient to deprive the court of jurisdiction.

<sup>4</sup> *Jones v. Jones*, 60 Tex. 451.

limits of the state is a form of constructive service, and must be authorized by the statute, otherwise such service will not give the court jurisdiction.<sup>1</sup> Where this form of service is had the proceedings are said to be *in rem*, and a personal judgment against the defendant is void, as in other cases where the judgment is based upon constructive service.<sup>2</sup> No decree for alimony or division of property should be granted where jurisdiction is obtained by this form of service.<sup>3</sup> A decree of divorce based upon this form of service has the same effect as if based upon any other form of constructive service.<sup>4</sup> Such decree will be valid in every state in the Union so far as it determines the *status* of the plaintiff, and in all the states except New York it is considered as a complete dissolution of the marriage, since it is impossible that a union, when it has been dissolved, can exist as to one party. In New York the decree based on personal service out of the state has no effect upon the defendant although she has actual notice of the proceedings.<sup>5</sup> If she was present at the taking of the depositions out of the state, this will not constitute such an appearance as will give the court jurisdiction to render a decree affecting her *status*.<sup>6</sup> But the decree is binding on defendant if a general appearance is made.<sup>7</sup>

<sup>1</sup> Burton *v.* Burton, 45 Hun, 68. Such service is not authorized by a statute directing that a subpoena be "served personally on defendant wherever found." Ralston's Ap., 93 Pa. 133, overruling Harvey *v.* Harvey, 2 Week. Notes Cases, 225; Keene *v.* Keene, 2 id. 492; Love *v.* Love, 10 Phila. 453; Snyder *v.* Snyder, 10 id. 306. See, also, Briggs *v.* Briggs, 6 Kulp, 490; Bischoff *v.* Wethered, 9 Wall. 812.

<sup>2</sup> Shepard *v.* Wright, 113 N. Y. 582.

<sup>3</sup> But see *contra*, Thurston *v.* Thurston (Minn.), 59 N. W. 1017.

<sup>4</sup> Smith *v.* Smith, 43 La. An. 1140, 10 So. 248.

<sup>5</sup> Williams *v.* Williams, 6 N. Y. Supp. 645, affirmed in 130 N. Y. 193, 29 N. E. 98, citing authorities.

<sup>6</sup> O'Dea *v.* O'Dea, 101 N. Y. 23, 4 N. E. 110.

<sup>7</sup> Jones *v.* Jones, 108 N. Y. 405, 15 N. E. 707. A decree of divorce obtained in America is void in England, although personal service was had upon the defendant in England. Such decree has no effect upon the rights of an Englishman whose domicile is in England, and who has not submitted to the jurisdiction of the court. Green *v.* Green, 1893 Prob. 89.

**§ 825. Decrees based on constructive service, how vacated.**—Where the defendant is not served with summons within the state, and the service is constructive, the decree will be set aside for fraud or lack of jurisdiction, as in other cases. Thus, where the plaintiff deceives the court by falsely swearing that he does not know defendant's present address, the decree will be set aside.<sup>1</sup> Another form of fraud which will justify the vacation of a decree is the insertion of the notice in an obscure paper, or one published under such circumstances as to be inaccessible to the defendant, with a desire to obtain the divorce without actual notice to defendant.<sup>2</sup> It is held that in some instances a default, where there is constructive service, may be set aside as though there had been personal service.<sup>3</sup> It would seem that a decree of divorce based upon constructive service might be set aside under the same circumstances as any other decree thus obtained.<sup>4</sup> But in some of the states it is held that the provision for vacating decrees obtained by constructive service does not apply to decrees of divorce.<sup>5</sup> Thus, where the statute provided that constructive service may be had in divorce cases as in other cases, and another section of the code provided for such service and for vacating all decrees obtained by such service, it was held that a decree of divorce could not be vacated under the latter provision.<sup>6</sup> Such decrees

<sup>1</sup> *Britton v. Britton*, 45 N. J. Eq. 88, 15 A. 266; *Holmes v. Holmes*, 63 Me. 420; *Brayant v. Austin*, 36 La. An. 808; *Crouch v. Crouch*, 30 Wis. 667; *Johnson v. Coleman*, 23 Wis. 452; *Edson v. Edson*, 108 Mass. 590. *Van Derveer v. Van Derveer*, 30 W. Law Bul. (Ohio), 96; *Cralle v. Cralle*, 79 Va. 182; *Crouch v. Crouch*, 30 Wis. 667; *Edson v. Edson*, 108 Mass. 590; *Meyar v. Meyar*, 3 Met. 299.

<sup>5</sup> *Owen v. Sims*, 43 Tenn. (3 Coldw.) 544; *Gilruth v. Gilruth*, 20 Ia. 225; *McJunkin v. McJunkin*, 3 Ind. 30.

<sup>2</sup> *Adams v. Adams*, 51 N. H. 388; *Everett v. Everett*, 60 Wis. 200; *Hemphill v. Hemphill*, 38 Kan. 220.

<sup>6</sup> *O'Connell v. O'Connell*, 10 Neb. 390. This interpretation is clearly wrong, so far as it follows *Lewis v. Lewis*, 15 Kan. 181, which was based upon special statutes providing for personal service outside of the state and was controlled by special provisions.

<sup>3</sup> *Grown v. Grown*, 58 N. Y. 609, reversing 1 Hun, 443; *Von Rhade v. Von Rhade*, 2 Sup. Ct. (T. & C.) N. Y. 491.

<sup>4</sup> *Lawrence v. Lawrence*, 73 Ill. 577; *Smith v. Smith*, 20 Mo. 166;

may be vacated under a statutory provision that no proceedings may be had to vacate a decree of divorce if commenced within six months after the rendition of such decree, and the same relief may be had under special provision in some states.<sup>1</sup> In all cases, except where the jurisdiction is attacked, the moving party must make a sufficient showing of a valid defense to the divorce proceeding so that the court may be able to see that the divorce would not have been rendered if the defendant had had an opportunity to be heard.<sup>2</sup> The fact that defendant was a resident of the state will render the judgment erroneous and subject to vacation upon the defendant's application.<sup>3</sup> But such fact does not render the decree subject to collateral attack.<sup>4</sup> Where the decree, based on constructive service, is attacked by a motion to vacate and open the decree on account of defective proceedings prior to the publication of summons, the procedure conforms to the civil code.<sup>5</sup> A decree by default, rendered before the time allowed in the notice for defendant to answer, is merely erroneous, and can be attacked only by motion or appeal, and by the party aggrieved. It is not subject to collateral attack.<sup>6</sup>

<sup>1</sup>See *Hemphill v. Hemphill*, 38 Kan. 220. *v. Day*, 67 Tenn. 77; *Lawson v. Moorman*, 85 Va. 880, 9 S. E. 150. See *contra*, *Hartley v. Boynton*, 17 Fed. 873.

<sup>2</sup>*Morton v. Morton*, 16 Colo. 358, 27 P. 718; *Britton v. Britton*, 45 N. J. Eq. 88, 15 A. 266; Carr's Adm. v. Carr, 92 Ky. 552, 18 S. W. 810; *Larimore v. Knoyle*, 43 Kan. 338, 23 P. 487. See, also, the showing held insufficient in *Richardson v. Stowe*, 112 Mo. 33, 14 S. W. 810.

<sup>3</sup>*Morrison v. Morrison*, 64 Mich. 53, 30 N. W. 903.

<sup>4</sup>*Martin v. Burns*, 80 Tex. 676, 16 S. W. 1072. See, also, *Van Fleet's Col. At.*, § 398, citing *Ogden v. Walters*, 12 Kan. 282; *Larimore v. Knoyle*, 43 Kan. 338; *Rayne v. Lott*, 90 Mo. 676, 3 S. W. 402; *Hammond v. Davenport*, 16 O. St. 177; *Walker*

*v. Day*, 67 Tenn. 77; *Lawson v. Moorman*, 85 Va. 880, 9 S. E. 150. See *contra*, *Hartley v. Boynton*, 17 Fed. 873.

For effect of delay and estoppel on application to vacate decree, see § 1056.

Effect of marriage after decree, § 1053.

Effect of death of one of the divorced parties, § 1054.

Procedure in vacating decree obtained by fraud, § 1057.

<sup>5</sup>For forms of motions and order vacating decree see *Atkins v. Atkins*, 9 Neb. 191; *Beach v. Beach*, 6 Dak. 371.

<sup>6</sup>*In re Newman*, 75 Cal. 213.

## TEMPORARY ALIMONY.

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| § 850. In general.<br>851. The power to grant temporary alimony.<br>852. Annulment of marriage.<br>853. Evidence on application for alimony—Proof of marriage.<br>854. Same—Probable cause for divorce or a valid defense.<br>855. Same—Poverty of the wife.<br>856. Same—The husband's income.<br>856a. Defenses to application. | § 857. Same—Misconduct of the wife.<br>858. Same—Offer to support wife.<br>859. Amount of temporary alimony.<br>860. When temporary alimony commences and terminates.<br>861. How the order is enforced.<br>862. Appeal.<br>863. Temporary alimony on appeal. |
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§ 850. **In general.**—The allowance to the wife for her maintenance during a suit for divorce is called temporary alimony. It is also designated by other terms such as “alimony *ad interim*” and “alimony *pendente lite*.” The allowance at common law was based upon the theory that the husband had all the property and was bound to support the wife according to his rank and condition. Modern legislation enlarging the rights of married women has not relieved the husband of the obligation to support his wife, and the temporary alimony of the common law is not affected by such legislation, unless it be that the wife on her application is now bound to show that her separate property does not furnish her sufficient support.<sup>1</sup> In nearly every respect our temporary alimony conforms to that of the common law, is

<sup>1</sup>Marker *v.* Marker, 11 N. J. Eq. 256; Westerfield *v.* Westerfield, 36 N. J. Eq. 196; Verner *v.* Verner, 62 Miss. 260; Magurn *v.* Magurn, 10 Ont. Prac. R. 570, 11 Ont. Ap. 178; Bradley *v.* Bradley, 10 Ont. Prac. R. 571; Snider *v.* Snider, 11 Ont. Prac. R. 140.

for the same purpose, and is granted for the same reasons and under like circumstances.<sup>1</sup>

**§ 851. The power to grant temporary alimony.**—In some of the early cases it was held that the power to grant temporary alimony must be derived from statute and that our courts could not follow the ecclesiastical practice, although they had the power to grant divorces.<sup>2</sup> Afterwards the power to grant temporary alimony was conferred by legislation in the states where such power was denied.<sup>3</sup> But it is now conceded that such relief may be granted to the wife without the aid of statute. Courts of equity have inherent power to compel the husband to provide the wife sufficient means to enforce her rights against him, or to defend her rights where he is the plaintiff. To deny her the means to sue or defend is in effect to deny her all remedy. The power to grant divorces necessarily carries with it the incidental power to allow the wife temporary alimony. The courts are also justified in following the practice in the ecclesiastical courts, which is a part of our common law. But the true doctrine is, that this power is not an incident of a divorce proceeding, but is an inherent power vested in courts of equity to assist the wife in proceedings where the husband and wife are adverse parties and the wife is without means. The later authorities are in accord with this doctrine where there is no provision for alimony, and also

<sup>1</sup>In some instances the statute permits alimony only when the wife is plaintiff. *Morton v. Morton*, 33 Mo. 614.

For form of application for temporary alimony, see § 746 and § 760.

Form of order for temporary alimony, see § 761.

When application should be made, see § 746.

<sup>2</sup> *Wilson v. Wilson*, 2 Dev. & B. 577; *Harrington v. Harrington*, 10 Vt. 505; *Hazen v. Hazen*, 19 Vt. 603; *Shannon v. Shannon*, 2 Gray,

285; *Coffin v. Dunham*, 62 Mass. 404; *Sandford v. Sandford*, 2 R. I. 64; *Parsons v. Parsons*, 9 N. H. 309; *Rowell v. Rowell*, 63 N. H. 222; *Quincy v. Quincy*, 10 N. H. 272; *Whipp v. Whipp*, 54 N. H. 580; *Morris v. Palmer*, 39 N. H. 123.

<sup>3</sup> *Nary v. Braley*, 41 Vt. 180; *Reeves v. Reeves*, 82 N. C. 348; *Lea v. Lea*, 104 N. C. 603; *Miller v. Miller*, 75 N. C. 70; *Webber v. Webber*, 79 N. C. 572; *Taylor v. Taylor*, 1 Jones (N. C.), 528; *Thayer v. Thayer*, 9 R. I. 377.

where there is a provision for permanent alimony but the statute is silent as to temporary alimony.<sup>1</sup> Accordingly it is held that in the absence of statute the courts have inherent power to allow the wife alimony in various proceedings in which she is an adverse party to her husband either as plaintiff or defendant, as in actions to annul a marriage;<sup>2</sup> in actions for alimony without divorce;<sup>3</sup> in actions to set aside a decree of divorce;<sup>4</sup> on applications to make a decree *nisi absolute*;<sup>5</sup> on applications to modify a decree of alimony;<sup>6</sup> and on appeal.<sup>7</sup> It is also clear that appellate courts have the same inherent power to grant temporary alimony where the necessity arises on appeal.<sup>8</sup>

Temporary alimony may be granted upon certain conditions fixed by the court. But it is an abuse of discretion to allow alimony to the wife only upon condition that she waive a matter of right, as a trial by jury.<sup>9</sup>

**§ 852. Annulment of marriage.**—In actions to annul a marriage the court has the inherent power to award temporary alimony to the wife whether she is plaintiff or defendant. According to the ecclesiastical practice such alimony should be granted to the wife to enable her to make a defense, the reason being that the husband, by virtue of the *de facto* marriage, had the right to possess all the prop-

<sup>1</sup> *Griffin v. Griffin*, 47 N. Y. 134; *Ex parte*, 34 Ala. 455; *Everett v. Petree v. People*, 40 Ill. 334; *Goldsmith v. Goldsmith*, 6 Mich. 285; *Jones v. Jones*, 18 Me. 308; *Tayman v. Tayman*, 2 Md. Ch. 393; *Brinkley v. Brinkley*, 50 N. Y. 184; *Porter v. Porter*, 41 Miss. 116; *Melizet v. Melizet*, 1 Parsons, 77; *Banes v. Banes*, 8 Phila. 250; *McGee v. McGee*, 10 Ga. 478; *Ryan v. Ryan*, 9 Mo. 539; *Grove's Appeal*, 68 Pa. 143.

<sup>2</sup> See next section.

<sup>3</sup> See Alimony without divorce.

<sup>4</sup> *Wilson v. Wilson*, 49 Ia. 544; *Smith v. Smith*, 3 Or. 363; *McFarland v. McFarland*, 51 Ia. 565; *Quelin v. Quelin*, 11 Pa. Co. Ct. 265; *Smith*,

<sup>5</sup> *Foden v. Foden*, 6 Rep. (1894), 63.

<sup>6</sup> *Thurston v. Thurston*, 38 Ill. Ap. 464; *Blake v. Blake*, 68 Wis. 303; *Blake v. Blake*, 70 Wis. 238; *Helden v. Helden*, 7 Wis. 296, 9 Wis. 557, 11 Wis. 554; *O'Brien v. O'Brien*, 19 Neb. 584.

<sup>7</sup> See § 862.

<sup>8</sup> But see § 863.

<sup>9</sup> *Lowenthal v. Lowenthal*, 68 Hun, 366, disapproving *Sigel v. Sigel*, 19 N. Y. Supp. 906. See, also, *Strong v. Strong*, 5 Rob. (N. Y.), 612.

erty of the wife, and it was presumed that she had no property.<sup>1</sup> Our courts have followed this practice and to some extent affirmed the above cases.<sup>2</sup>

In the leading case on this question the husband contended that, as the wife had another husband living and not divorced, the marriage was void and the court had no jurisdiction to award alimony. The appellate court held that the lower court had the same power in regard to temporary alimony as the ecclesiastical courts. This was not "upon the theory that the court of chancery of this state was vested with the jurisdiction of the ecclesiastical courts of England in matrimonial cases, or that (except in special cases hereafter referred to) it ever possessed any jurisdiction in cases of divorce other than that which was conferred by our statutes; but upon the ground of the general equitable jurisdiction of the court, and also that when our statutes did confer jurisdiction upon the court of chancery, in those actions for divorce which by the English law are solely cognizable in the ecclesiastical courts, *the grant of that jurisdiction carried with it by implication the incidental powers which were indispensable to its proper exercise*, and not in conflict with our own statutory regulations on the subject.<sup>3</sup> The inherent power of courts of equity to require the husband to pay temporary alimony is said to exist although the

<sup>1</sup> *Bird v. Bird*, 1 Lee, 209, decided in 1753; *Snyth v. Smyth*, 2 Add. Ec. 254; *Portsmouth v. Portsmouth*, 3 Add. Ec. 63; *Bain v. Bain*, 2 Add. Ec. 253; *Miles v. Chilton*, 1 Rob. Ec. 684. See, also, *Reynolds v. Reynolds*, 45 L. J. (N. S.) 89.

<sup>2</sup> *North v. North*, 1 Barb. Ch. 241; *Vroom v. Marsh*, 29 N. J. Eq. 15; *Allen v. Allen*, 8 Ab. N. C. 175; *Ford v. Ford*, 41 How. Pr. 169; *Firth v. Firth*, 18 Ga. 273, overruling *Roseberry v. Roseberry*, 17 Ga. 139. But see *contra*, *Kelley v. Kelley*, 161 Mass. 111, 36 N. E. 837, in

which the authority is said to be statutory only.

<sup>3</sup> *Griffin v. Griffin*, 47 N. Y. 137, followed in *Brinkley v. Brinkley*, 50 N. Y. 184; *Lee v. Lee*, 66 How. 207; *O'Dea v. O'Dea*, 31 Hun, 441, affirmed without opinion, 93 N. Y. 667. But see *contra*, where the wife applies for annulment on the ground of the husband's impotency, *Bartlett v. Bartlett*, 1 Clark Ch. 460; *Bloodgood v. Bloodgood*, 59 How. Pr. 42. But alimony was allowed in a similar case. *Allen v. Allen*, 59 How. Pr. 27.

code has provided for such alimony only in suits for divorce.<sup>1</sup> Where the statute provides for temporary alimony in suits for divorce "from the bonds of matrimony," this is held to include nullity suits, since in common-law language the decree of nullity was from the bonds of matrimony.<sup>2</sup> And similar constructions are found where the statute does not distinguish between annulment and divorce.<sup>3</sup>

In the cases cited the wife is a defendant. A distinction is made where she is the plaintiff and alleges that the marriage is void and that defendant is not her husband. In such case temporary alimony and counsel fees are refused.<sup>4</sup> But where the parties have entered into a void marriage and lived together for some time, and the putative husband has acquired the wife's property, the wife's necessity would be the same as in the ordinary suit for divorce. This is true where the statute declares the marriage valid until declared void by a court of competent jurisdiction.<sup>5</sup> But the putative wife is not entitled to alimony where it appears that the cohabitation was illicit,<sup>6</sup> or it is admitted that she is the wife of another, or such fact is not contradicted by her in her showing on the application for temporary alimony.<sup>7</sup>

### § 853. Evidence on application for alimony — Proof of marriage.— In order to obtain an order for alimony, costs

<sup>1</sup> Poole *v.* Wilber, 95 Cal. 339, 30 P. 548.

<sup>2</sup> Lea *v.* Lea, 104 N. C. 603.

<sup>3</sup> Brown *v.* Brown, 18 Ill. Ap. 445; Barber *v.* Barber, 74 Ia. 301; Van Valley *v.* Van Valley, 19 O. St. 588.

<sup>4</sup> See Meo *v.* Meo, 22 Abb. N. C. 58, where the wife alleged the marriage was void on the ground of fraud. See, also, Isaacsohn *v.* Isaacsohn, 3 Mon. Law Bul. 73.

<sup>5</sup> See Bardin *v.* Bardin (S. Dak.), 56 N. W. 1069.

<sup>6</sup> Humphreys *v.* Humphreys, 49 How. Pr. 140.

<sup>7</sup> Collins *v.* Collins, 71 N. Y. 269.

In Freeman *v.* Freeman, 49 N. J. Eq. 102, the husband sued for a decree of nullity on the ground that the wife had another husband living and not divorced. On the application for alimony it appeared that the wife had another husband living, but she claimed that her first marriage was void because the first husband had a wife living and therefore her second marriage was valid. The validity of the marriage of the first husband not being shown except by his unsworn statements, the court denied temporary alimony.

and counsel fees, the wife must sustain her application by proof of —

1. A marriage, either legal or *de facto*.
2. A probable cause for divorce or valid defense.<sup>1</sup>
3. Her inability to support herself and prosecute or defend the action.<sup>2</sup>
4. The husband's ability to contribute to her support.<sup>3</sup>

All these facts must be established in order to entitle her to this relief. The evidence to establish these facts is generally in the form of affidavits, but other evidence may be received, as depositions, the petition and answer in the case; or the parties may be examined in court where such practice is permitted on the hearing of motions. The marriage which will justify an order for alimony in a suit for annulment of marriage has been noticed in a previous section.<sup>4</sup>

To entitle the wife to temporary alimony she must establish by *prima facie* proof that the marriage relation exists; but the proof need not be of the degree necessary to establish a marriage at the trial. The true rule in some cases is said to be that the wife must establish "a fair presumption of the fact of marriage," or "a reasonably plain case of the existence of the marital relation."<sup>5</sup> Mr. Bishop has laid down the following rule: "To justify an order for temporary alimony there must be a marriage, either valid in fact or by the parties supposed to be valid, by reason whereof they have entered upon those mutual property relations which govern matrimonial cohabitation. Further than this it need not be good in law." But after an examination of all the reported cases the writer believes the true rule to be that *temporary alimony must be granted where there is a real issue as to the marriage which cannot be readily deter-*

<sup>1</sup> § 854.

<sup>5</sup> Brinkley *v.* Brinkley, 50 N. Y.

<sup>2</sup> § 855.

184; Collins *v.* Collins, 71 N. Y. 269,

<sup>3</sup> § 856. For the nature of the application for alimony, whether by petition or motion, see § 746.

cited with approval in Bardin *v.* Bardin (S. Dak.), 56 N. W. 1069; Walsh *v.* Walsh, 4 Misc. (N. Y.) 448.

<sup>4</sup> § 852.

*mined without a trial.* The court can seldom determine from the showing that there is a valid marriage, but generally reserves this question until the trial. It is clear that the court should not pass upon an ultimate fact in the case with no other evidence than the pleadings and affidavits. The object in the examination is to determine whether the woman is presenting a real issue in good faith, and whether the fact does not appear from the showing that she will fail to establish a marriage at the trial. To avoid the payment of temporary alimony the husband must make it appear that there is no marriage relation, and no real controversy concerning the existence of such relation.<sup>1</sup>

It is seldom that the husband is able to make such a showing without the aid of the wife's admissions that no marriage exists. In a Michigan case the wife alleged, in her bill for divorce on the ground of cruelty, that she had married the man with full knowledge of the fact that he was living apart from his wife under an agreement of separation. No other showing was made. "The bill," said the court, "does not bring the complainant within any recognized equity; and on such a bill no provision could properly be made for alimony."<sup>2</sup> No temporary alimony should be allowed where the woman admits in her answer that she had a husband living at the time of the alleged marriage. It being clear

<sup>1</sup> A recent writer has stated the law upon this point as follows: "It has been held that, to warrant the court in granting an order, a marriage must be admitted or proved *to the satisfaction of the court.* The proof, however, need not be so full as will be essential to obtain a final decree, and the court, when in doubt from the evidence presented, will usually incline at the outset to favor the wife and grant alimony. It will seek, on the one hand, to prevent a mere adventurress, by her allegation of a mar-

riage, from compelling a man to support her during a protracted suit; and on the other, to prevent a man, by his mere denial of marriage, from relieving himself from his liability to support his wife." Browne on Divorce. There is a tacit admission in this statement that the object of the investigation by the court is not, in fact, to determine that there is a marriage, but to determine the good faith of the wife's application.

<sup>2</sup> Lapp v. Lapp, 43 Mich. 287.

that she is not his wife, there is no controversy as to the marriage relation, and it is error to award her alimony.<sup>1</sup> Where the husband shows that there is a prior marriage undissolved, and this fact is not controverted, the court must refuse temporary alimony; because there is no marriage relation shown, and *no controversy concerning it*. Thus, the correct rule in such cases is, that "when, in answer to the allegation of marriage, facts are disclosed showing that the applicant was not competent to contract such marriage, and did not thereby become a wife, such facts must be denied or explained to the satisfaction of the court. If left uncontested, the court is not justified in making the order."<sup>2</sup>

According to this rule the wife will be entitled to alimony where she swears that at the time of her second marriage she believes, and had reason to believe, that her first husband was dead. The reason for granting her alimony in such cases is that "to adjudge *in limine*, upon *ex parte* affidavits, that the complainant will probably succeed, and therefore to withhold from the defendant the means of resisting the attack, would be substantially, to a certain extent, a pre-judgment adverse to her on the merits without lawful evidence, the consequence of which might and probably would be that she would be unable to defend herself. A good defense might, by such means, be prevented, and a bad cause consequently succeed."<sup>3</sup> Where the prior marriage is set up as a defense, the wife is entitled to alimony where she shows that the former husband was absent more than the required number of years before the second marriage took

<sup>1</sup> *Appleton v. Warner*, 51 Barb. 270.

<sup>2</sup> *Collins v. Collins*, 71 N. Y. 269; approved in *Freeman v. Freeman*, 49 N. J. Eq. 102, 23 A. 113. See, also, *Collins v. Collins*, 80 N. Y. 1; *Humphreys v. Humphreys*, 49 How. Pr. 140; *Brinkley v. Brinkley*, 50 N. Y. 184; *North v. North*, 1 Barb. Ch. 241.

<sup>3</sup> *Vandegrift v. Vandegrift*, 30 N. J. Eq. 76, distinguishing *Ballantine v. Ballantine*, 1 Hal. Ch. 471; *Begbie v. Begbie*, 3 Hal. Ch. 98; *Dougherty v. Dougherty*, 4 Hal. Ch. 540; *Martin v. Martin*, 4 Hal. Ch. 563; *Glasser v. Glasser*, 28 N. J. Eq. 22. The doctrine in this case is approved in *Freeman v. Freeman*, 49 N. J. Eq. 102, 23 A. 113.

place, and consequently the second marriage is void only from the entry of the decree. Such issue raises a controversy about the marriage relation which cannot be tried upon affidavits.<sup>1</sup> The fact that the wife alleges the marriage is void does not preclude her from receiving alimony, since it is by the *de facto* marriage that the husband becomes liable for her support.<sup>2</sup>

It is clear that the application should be denied where the husband shows that the marital relation has already been dissolved by a valid decree of divorce. The validity of this decree may be passed upon in ruling on the application.<sup>3</sup> But if the jurisdictional facts are disputed by the wife, the court cannot determine the question without a trial, and for this reason should allow the wife temporary alimony.<sup>4</sup>

Where no ceremony has been performed, but the parties have cohabited as husband and wife for some time, it seems clear that the validity of the marriage cannot be determined by affidavits; and the court should, in such case, grant temporary alimony. And this seems to be the common practice in such cases.<sup>5</sup> In some instances the order is granted where the parties formed an illicit connection, and the wife claims that a valid common-law marriage was subsequently entered into, or that a marriage took place after the man had obtained a divorce from his first wife.<sup>6</sup> But in one case the order of the lower court was reversed where the husband denied the marriage. The supreme court undertook to de-

<sup>1</sup> *Bardin v. Bardin* (S. Dak.), 56 N. W. 1069; *Poole v. Wilber*, 95 Cal. 339. But see *contra*, *Kinney v. Kinney*, 7 Daly (N. Y.), 460.

<sup>2</sup> *Cray v. Cray*, 32 N. J. Eq. 25; *Vroom v. Marsh*, 2 Stew. Ch. 15.

<sup>3</sup> *Kirrigan v. Kirrigan*, 15 N. J. Eq. 146; *Kiefer v. Kiefer*, 4 Colo. Ap. 506, 36 P. 621; *Shaw v. Shaw* (Ia.), 61 N. W. 368.

<sup>4</sup> *Starkweather v. Starkweather*, 29 Hun, 488. See *contra*, *Ober v. Ober*, 7 N. Y. Supp. 843.

<sup>5</sup> *McFarland v. McFarland*, 51 Ia. 565; *Hereforth v. Hereforth*, 2 Ab. Pr. N. S. (N. Y.) 483; *Brinkley v. Brinkley*, 50 N. Y. 184; *Smith v. Smith*, 1 Edw. Ch. 255; *Smyth v. Smyth*, 2 Ad. Ec. 254; *Bradley v. Bradley*, 3 Chan. Chamb. (Ont.) 329; *McGrath v. McGrath*, 2 Chan. Chamb. 411; *Fisk v. Fisk*, 22 La. An. 401.

<sup>6</sup> *Vincent v. Vincent*, 17 N. Y. Supp. 497, 16 Daly, 534; *Bowman v. Bowman*, 24 Ill. Ap. 165.

termine from the showing made whether a marriage ceremony had been performed. The showing on this point was very conflicting; but it was admitted that the parties had cohabited as husband and wife for a long time, and that he introduced her as his wife on several occasions. The evidence was so conflicting that the court could not readily determine the real issue in the case. But the court decided such issue in advance, and refused temporary alimony because no marriage was admitted or proved.<sup>1</sup> The writer believes the doctrine announced in this case is unsound, and the method pursued is contrary to the authorities. This opinion does not appear to have met with approval elsewhere.

In the famous case of *Sharon v. Sharon*,<sup>2</sup> the plaintiff alleged a marriage contract in writing, which, by its terms, was to be kept secret, and that afterwards the parties consummated the marriage and recognized her in public and private as his wife, but had subsequently deserted her and neglected to support her, and prayed for divorce and alimony. The defendant denied the marriage and also denied that he ever introduced plaintiff as his wife, or spoke of her as such in the presence of other persons, or that plaintiff ever spoke of him as her husband in the presence of others, or that the parties were ever reputed, among their mutual friends, to be husband and wife, or that there was at any time any mutual, open recognition of such relationship by the parties, nor any public assumption by them of the relation of husband and wife. The answer alleged that the contract of marriage was a forgery. It was held not an abuse of discretion to award temporary alimony under such circumstances.

Where the marriage is denied temporary alimony should not be granted to the wife on her affidavit alone. Otherwise an adventuress could by perjury compel a man to pay her temporary alimony as long as her unfounded suit could

<sup>1</sup> *York v. York*, 34 Ia. 530.

<sup>2</sup> 75 Cal. 1.

be "spun out."<sup>1</sup> The denial of the marriage must be overcome by further proof.<sup>2</sup> The wife's affidavit is sufficient, however, where the showing made by the husband discloses that the parties have long cohabited as man and wife, and that he has attempted to obtain a divorce.<sup>3</sup>

**§ 854. Same — Probable cause for divorce or a valid defense.**— When the wife applies for temporary alimony and suit money, she must show that she has a probable cause for divorce, or, if she is the defendant, that she has a valid defense to the suit.<sup>4</sup> This is required to prevent imposition upon the court and to protect the husband from being compelled to assist the wife in her suit where she has no cause of action and the suit must fail. Generally the court refuses to enter into an examination of affidavits to determine the merits of the case before allowing alimony.<sup>5</sup> But the pleadings are inspected, and alimony is refused if her pleadings do not state a cause of action or a defense.<sup>6</sup> This is not an absolute rule, however. The court, being free to exercise its discretion, may award alimony where the wife's pleading is not manifestly defective, especially where a demurrer has been filed by the husband that raises a question of law that cannot be readily determined. In such case the wife needs the means to employ counsel to protect her rights and also

<sup>1</sup> *Vreeland v. Vreeland*, 18 N. J. (6 Lea), 499; *Desborough v. Desborough*, 29 Hun. 592; *Friend v. Friend*, Eq. 43.

<sup>2</sup> *Smith v. Smith*, 61 Ia. 138.

<sup>3</sup> *Finkelstein v. Finkelstein*, 14 Mont. 1, 34 P. 1090.

<sup>4</sup> *Lewis v. Lewis*, 3 Johns. Ch. 519.

<sup>5</sup> *Sparks v. Sparks*, 69 N. C. 319; *Cravens v. Cravens*, 4 Bush, 435; *Frith v. Frith*, 18 Ga. 273.

<sup>6</sup> *Worden v. Worden*, 3 Edw. Ch. 387; *Jones v. Jones*, 2 Barb. Ch. 146; *Rose v. Rose*, 11 Paige, 166; *Wood v. Wood*, 2 Paige, 454; *Robertson v. Robertson*, 1 Edw. Ch. 360; *Burrow v. Burrow*, 74 Tenn.

<sup>6</sup> *Desborough*, 29 Hun. 592; *Friend v. Friend*, 65 Wis. 412; *Weishaupt v. Weishaupt*, 27 Wis. 621; *Bucki v. Bucki*, 24 N. Y. Supp. 374; *Lishey v. Lishey*,

<sup>6</sup> *Tenn. 2*; *Kennedy v. Kennedy*, 73 N. Y. 369; *Carpenter v. Carpenter*, 19 How. Pr. 539; *Ballentine v. Ballentine*, 1 Halst. Ch. 471; *Rawson v. Rawson*, 37 Ill. Ap. 491;

<sup>6</sup> *Ward v. Ward*, 1 Tenn. Ch. 262; *Browne v. Burns*, 5 Scotch Sess. Cas. (2d Ser.) 1288; *Erwin v. Erwin*, 4 Jones' Eq. 82; *Methvin v. Methvin*, 15 Ga. 97; *Shearin v. Shearin*, 5 Jones' Eq. 233.

separate support until the demurrer is determined.<sup>1</sup> The necessity for alimony is the same whether the issue to be tried is one of law or of fact. Thus a demurrer to the jurisdiction of the court will not preclude the granting of alimony and suit money.<sup>2</sup> A demurrer against the wife's pleading should be filed if the husband wishes to object to alimony on account of the lack of probable cause. Otherwise the court may, in its discretion, refuse to determine the sufficiency of the wife's bill after he has answered without demurrer.<sup>3</sup> It is not an abuse of discretion to grant temporary alimony, although the case is pending on a plea of former adjudication.<sup>4</sup> An order for temporary alimony may be made without waiting for a trial of an issue concerning defendant's insanity.<sup>5</sup> Where the wife is defendant, her application for alimony and suit money should not be made until her demurrer or answer is on file, as a sound judicial discretion cannot be exercised without a knowledge of the issues which she will raise in the case. The meritorious defense should appear in the pleadings as well as in the affidavits submitted with her application.

In New York, and probably in some other states, the wife is required to show the merits of her case by affidavits if she applies for alimony in a suit for separation. This method may be some assistance to the court in determining the good faith of the application, but not in any other respect, as the merits can only be determined at the trial. A review of the decisions and the practice in this state cannot be entered into with profit. But a reference to the decisions on this point may be useful.<sup>6</sup> In Illinois the probable cause is

<sup>1</sup> *Langan v. Langan*, 91 Cal. 654, 108; *Turrell v. Turrell*, 2 Johns. Ch. 27 P. 1092; *Disbrough v. Disbrough* (N. J. Eq.), 20 A. 960.

<sup>3</sup> *Chaffee v. Chaffee*, 14 Mich. 463.

<sup>2</sup> *Gray v. Gray* (N. Y.), 38 N. E. 301, affirming 28 N. Y. Supp. 856;

<sup>4</sup> *Filer v. Filer*, 77 Mich. 469, 43

*King, Ex parte*, 27 Ala. 387; *Miller v. Miller*, 33 Fla. 453, 15 So. 222;

<sup>5</sup> *Storke v. Storke*, 99 Cal. 621, 34 P. 339.

*Ronalds v. Ronalds*, 3 P. & M. 259. See, also, *Mix v. Mix*, 1 Johns. Ch.

<sup>6</sup> *Bissel v. Bissel*, 1 Barb. 430; *Solomon v. Solomon*, 3 Rob. 669;

determined from affidavits as well as the pleadings.<sup>1</sup> The fact that a large number of counter-affidavits are filed does not necessarily prove that the court abused its discretion in awarding alimony and suit money, as the fact to be determined is not whether an offense was committed, but whether the complainant has a probable ground for divorce.<sup>2</sup> In such case the poverty of the wife may prevent her from making a sufficient showing.<sup>3</sup>

When a decree is rendered against the wife, the trial court may allow the wife additional alimony and suit money to permit her to perfect her appeal. The reason for this allowance is that the wife must be placed upon an equality with her husband until the case is finally determined. Like any other litigant, she has the right to have the rulings of the lower court reviewed. To deny alimony under such circumstances amounts to a denial of justice if she is without means to perfect and present an appeal.<sup>4</sup> In such case the wife must show that the review is prosecuted in good faith, and that some prejudicial error has been committed.<sup>5</sup> The

s. c., 2 How. Pr. 218; Worden *v.* Worden, 3 Edw. Ch. 387; Bourbon *v.* Bourbon, 3 Rob. (N. Y.) 715; Hollerman *v.* Hollerman, 1 Barb. 64; Snyder *v.* Snyder, 3 Barb. 621; Osgood *v.* Osgood, 2 Paige, 621; Fowler *v.* Fowler, 4 Abb. Pr. 511; Whitney *v.* Whitney, 22 How. Pr. 175; Douglas *v.* Douglas, 13 Ab. Pr. (N. S.) 291; Scragg *v.* Scragg, 18 N. Y. Supp. 487; Shaw *v.* Shaw, 5 Misc. 497; Frickel *v.* Frickel, 24 N. Y. Supp. 483; Jones *v.* Jones, 2 Barb. Ch. 146; Thomas *v.* Thomas, 18 Barb. 149; Carpenter *v.* Carpenter, 19 How. Pr. 539; Laurie *v.* Laurie, 9 Paige, 284; Shore *v.* Shore, 2 Sandf. 715; Meldore *v.* Meldore, 4 Sandf. 721; Wood *v.* Wood, 8 Wend. 357; Walsh *v.* Walsh, 24 N. Y. Supp. 335.

<sup>1</sup> Wheeler *v.* Wheeler, 18 Ill. Ap. 39; Umlauf *v.* Umlauf, 22 Ill. Ap. 583; Hardin *v.* Hardin, 40 Ill. Ap. 202; Wooley *v.* Wooley, 24 Ill. Ap. 431; Rawson *v.* Rawson, 37 Ill. Ap. 491; Jenkins *v.* Jenkins, 91 Ill. 168; Johnson *v.* Johnson, 20 Ill. Ap. 495; Brown *v.* Brown, 18 Ill. Ap. 446; Burgess *v.* Burgess, 25 Ill. Ap. 525.

<sup>2</sup> Zoellner *v.* Zoellner, 35 Ill. Ap. 404.

<sup>3</sup> Waters *v.* Waters, 49 Mo. 385.

<sup>4</sup> Whether the lower or appellate court has jurisdiction, see § 863.

<sup>5</sup> Friend *v.* Friend, 65 Wis. 413; Larkin *v.* Larkin, 71 Cal. 330, 12 P. 227; Painter *v.* Painter, 78 Cal. 625; Krause *v.* Krause, 23 Wis. 354; Van Voorhis *v.* Van Voorhis, 90 Mich. 276, 51 N. W. 281; Jones *v.* Jones, 2

trial court must look into the record, and from this and the knowledge of the case obtained at the trial may readily determine whether the appeal is without merits. This is a delicate task where the court has rendered the decree which is questioned, and the allowance should be made unless it is clear that the appeal is frivolous for the purpose of delay or to obtain temporary alimony and suit money. The appellate court may, in granting this kind of alimony, examine the record, although the question of a meritorious appeal is necessarily involved in the appeal itself.<sup>1</sup> The defendant may file counter-affidavits in the appellate court showing the merits of the appeal.<sup>2</sup> And the poverty of the wife and the ability of the husband must be shown if such fact do not appear in the record. Temporary alimony and suit money may be granted where the husband appeals from an order for temporary alimony.<sup>3</sup>

The court has a wide discretion in preventing the divorce suit being used as a means to obtain alimony and counsel fees by a wife who has no intention of procuring a divorce, or who cannot obtain a divorce because she has been guilty of misconduct which is a cause for divorce.<sup>4</sup> The power to compel the husband to furnish means to carry on the suit should be exercised with caution, and the alimony and suit money refused where the apparent object of the wife is to obtain money and not to prosecute or defend the suit.<sup>5</sup> Where there is grave doubt of the good faith of the application the temporary alimony may be ordered paid into court to await the trial.<sup>6</sup> Where ill faith or collateral purpose are suspected the amount awarded should be small until the trial.

P. & M. 333; *Holthoefer v. Holt-hoefer*, 47 Mich. 643; *Whitmore v. Whitmore*, 49 Mich. 417.

<sup>1</sup> *Friend v. Friend*, 65 Wis. 413; *Pollock v. Pollock* (S.D.), 64 N.W. 165.

<sup>2</sup> *Pleyte v. Pleyte*, 15 Colo. 125, 25 P. 25.

<sup>3</sup> *Ex parte Winter*, 70 Cal. 291.

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<sup>4</sup> *Dicken v. Dicken*, 38 Ga. 663.

<sup>5</sup> *Glasser v. Glasser*, 28 N.J. Eq. 22; *Kock v. Kock*, 42 Barb. 515; *Kirrigan v. Kirrigan*, 15 N.J. Eq. 146; *Swearingen v. Swearingen*, 19 Ga. 265.

<sup>6</sup> See *Rogers v. Rogers*, 4 Swab. & T. 82.

If the husband has been declared insane for more than one year, and the wife seeks divorce for cruelty inflicted during the year, the court may refuse temporary alimony. "The order implies a default and neglect of a moral obligation on the part of the defendant. This ought not to be imputed to a lunatic. The embarrassment in enforcing such an order is also an objection to making it."<sup>1</sup> The probability that the cruelty was inflicted while the defendant was insane is also another reason why alimony should be refused in some cases; as the wife is then unable to show a probable cause for divorce. The guardian of an insane person should be made a party to the suit; and where the guardian is not joined as a party, an order compelling him to pay alimony and counsel fees is void for want of jurisdiction.<sup>2</sup>

**§ 855. Same — Poverty of the wife.**— The wife must make it appear that she has not sufficient means to maintain herself and pay the expenses of her suit, as there is no presumption that a married woman is without means. At the common law the wife's property was generally under the control of the husband, but not always, since she may have property by virtue of a marriage settlement or other means. The ecclesiastical courts seem to have allowed temporary alimony almost as a matter of course, without much inquiry as to the wife's circumstances. But as this relief is only granted on the ground of necessity, it is incumbent upon the wife to show that the necessity exists. Especially is this true at the present time, when married women may acquire and possess real and personal property in their own right.<sup>3</sup> It is error to grant alimony without such proof, as there is

<sup>1</sup> *McEwen v. McEwen*, 10 N. J. Eq. 286.

<sup>2</sup> In *Tiffany v. Tiffany*, 80 Ia. 122, 50 N. W. 554, the guardian *ad litem* for defendant answered setting up insanity as a defense to the alleged cruelty. The guardian of the insane husband, on the order of the court, paid the wife the sum al-

lowed her and also her attorney's fees, and a sum to the guardian *ad litem*. It was held that an appeal would lie from this order, although the amounts had been paid, as the order was void, being made against one not a party to the suit.

<sup>3</sup> *Ross v. Ross*, 47 Mich. 185; *Marker v. Marker*, 11 N. J. Eq. 256.

no presumption that she has no property.<sup>1</sup> To grant temporary alimony without proof of the wife's needs is an abuse of discretion. "The fact that the wife is destitute of means to carry on her suit and to support herself during its pendency is as essential as any other fact to authorize the court to award temporary alimony. This is not a mere matter of discretion, but a settled principle of equity."<sup>2</sup> But the appellate court of Illinois refused to reverse an order for alimony where there was no proof of the poverty of the wife. "There is no presumption," it was said, "that a married woman, sixteen years a wife, has any property. As the world goes, she generally has none."<sup>3</sup> This court seems to have overlooked the rule of evidence that the burden of proof is upon the moving party to establish all the essential facts which entitle such party to the relief demanded.<sup>4</sup>

Temporary alimony should be refused if it appear that the wife has sufficient income to support herself during the *trial*, to employ counsel and to advance the necessary costs and expenses.<sup>5</sup> It is immaterial how she derives this maintenance, if she is able to prosecute the suit, or to make a defense. The courts sometimes refuse to assist her where friends and relatives are doing so.<sup>6</sup> If the parties have been living apart for years, and the wife has supported herself, no alimony should be allotted.<sup>7</sup> It is clearly improper, and perhaps an abuse of discretion, to compel the husband to support and assist the wife during the suit, if she is liv-

<sup>1</sup> *Id.*; *Maxwell v. Maxwell*, 28 *Hun*, 566. *Kenemer*, 26 Ind. 330; *Harding v. Harding*, 40 Ill. Ap. 202; *Morrell v. Morrell*, 2 Barb. S. C. Rep. 480.

<sup>2</sup> *Collins v. Collins*, 80 N. Y. 1.

<sup>3</sup> *Ayers v. Ayers*, 41 Ill. Ap. 226.

<sup>4</sup> *Laciari v. Laciari*, 6 C. C. (Pa.) 403; *Eroh v. Eroh*, 4 Kulp, 521; *Bradley v. Bradley*, 3 Chan. Chamb. (Ont.) 329.

<sup>5</sup> *Turner v. Turner*, 80 Cal. 141, 22 P. 72; *Westerfield v. Westerfield*, 36 N. J. Eq. 195; *Rawson v. Rawson*, 37 Ill. Ap. 491; *Kenemer v.*

<sup>6</sup> *Bradstreet v. Bradstreet*, 6 Mackey, 502; *Zeigenfuss v. Zeigenfuss*, 21 Mich. 414; *Eaton v. Eaton*, 2 P. & M. 51; *Burrows v. Burrows*, 1 P. & M. 554.

<sup>7</sup> *Thompson v. Thompson*, 1 P. & M. 553; *George v. George*, 1 P. & M. 554.

ing in adultery with the paramour,<sup>1</sup> or where she is living with a second husband under a void marriage.<sup>2</sup> The fact that the wife has separate property will always be considered. If it is producing an income sufficient to maintain her, this relief is refused. If it is non-productive, or is not producing a sufficient income, the husband must supply the deficiency.<sup>3</sup>

Where the separate property of the wife yields no income, but can be sold or mortgaged by her, the court may in some cases refuse alimony. But ordinarily she should be assisted in the suit without forcing her to sell or encumber her estate, or to use up her capital.<sup>4</sup> If her income is inadequate she is not compelled to exhaust her separate property before the court will grant temporary alimony.<sup>5</sup> Where the husband has ample means, it was held that it was not an abuse of discretion to award temporary alimony, although the wife had recently sold her property and had an ample sum of money on deposit.<sup>6</sup> But generally no alimony should be allowed in such cases, especially where the wife is defendant and it is probable that the husband is entitled to a divorce.<sup>7</sup> Settlements upon the wife and agreements for separation are considered in the same way; and if adequate for the support of the wife no temporary ali-

<sup>1</sup> See *Holt v. Holt*, 1 P. & M. 610; *Miller v. Miller*, 2 Kulp (Pa.), 6.

<sup>2</sup> *Coad v. Coad*, 40 Wis. 392. See, also, *Stillman v. Stillman*, 99 Ill. 196.

<sup>3</sup> *Rose v. Rose*, 53 Mich. 585; *Campbell v. Campbell*, 73 Ia. 482; *Potts v. Potts*, 68 Mich. 492; *Ross v. Griffin*, 53 Mich. 8; *Killiam v. Killiam*, 25 Ga. 186; *Briggs v. Briggs*, 36 Ia. 383; *Hoffman v. Hoffman*, 7 Rob. (N. Y.) 474.

<sup>4</sup> *Harding v. Harding*, 144 Ill. 588.

<sup>5</sup> *Allen v. Allen*, 6 Rep. (1894), 38; *Miller v. Miller*, 75 N. C. 70. See *contra*, *Osgood v. Osgood*, 2 Paige, 624; *Morrell v. Morrell*, 2 Barb. Sup. Ct. Rep. 480.

<sup>6</sup> *Merritt v. Merritt*, 99 N. Y. 343, affirming *Merritt v. Merritt*, 19 J. & S. 540. See *contra*, *Coombs v. Coombs*, 1 P. & M. 218.

<sup>7</sup> Where the wife's property consists of realty in another state, valued at \$1,200, subject to a tax lien, and also a note of \$50 of doubtful value, the wife will be allowed temporary alimony and attorney fees; the property not being convertible into cash and she being unable to raise money soon enough to make her defense against her husband's suit. *Sellers v. Sellers* (Ind.), 40 N. E. 698.

mony will be allowed.<sup>1</sup> If the wife has received alimony in gross on a decree *a mensa* in a former suit, temporary alimony must be denied, unless she offers to restore the amount received.<sup>2</sup> For like reasons there is no necessity for temporary alimony where the wife has employment and can support herself and prosecute her suit from her own income. If her income is barely sufficient to support herself, she should be allowed suit money.<sup>3</sup>

Temporary alimony is said to be a provision for the future, and not a payment of amounts expended or debts incurred on the wife's credit.<sup>4</sup> Such an allowance can only be made for the payment of past expenses where it is necessary to enable the wife to further prosecute or defend her case.<sup>5</sup> If the wife has been able to pay expenses with means derived from her own separate estate, or upon her credit, there is no necessity for the allowance. The fact that she has been able to pay her expenses, or to obtain money on her own credit, is the best evidence of her ability to carry on the suit without assistance.<sup>6</sup> Where the wife has incurred costs and attorney's fees and her suit is dismissed, the court may generally make an order to pay such expenses.<sup>7</sup>

<sup>1</sup> *Sharon v. Sharon*, 75 Cal. 1; <sup>3</sup> *Marker v. Marker*, 11 N. J. Eq.   
*Campbell v. Campbell*, 73 Ia. 482; 256.

*Cooper v. Cooper*, 17 Mich. 205; <sup>4</sup> *Beadleston v. Beadleston*, 103  
*Bartlett v. Bartlett*, 1 Clark's Ch. N. Y. 402, approved in *McCarthy v. McCarthy*, 137 N. Y. 500, 33 N. E. 460; *Miller v. Miller*, 43 How. Pr. 550; *Emerson v. Emerson*, 26 N. Y. 125. See leading case of *Powell v. Powell*, 3 P. & M. 186, and cases cited. Supp. 292; *Atherton v. Atherton*, 82 Hun, 179.

<sup>2</sup> *McDonough v. McDonough*, 26 How. Pr. 193. The wife had obtained a divorce for cruelty, and the decree allowed her \$100 in full of all claims for alimony. In the suit by her husband for divorce on the ground of adultery, it was held that the former decree was a bar to further allowance, but an attorney fee was allowed with the privilege of alimony on restoring amounts received on the decree.

<sup>5</sup> See *Bohnert v. Bohnert*, 91 Cal. 428, 27 P. 732.

<sup>6</sup> *Loveren v. Loveren*, 100 Cal. 493, 35 P. 87; *Mudd v. Mudd*, 98 Cal. 322; *Lacey v. Lacey* (Cal.), 40 P. 1056.

<sup>7</sup> Under a statute providing that "pending a petition for divorce the court or the judge thereof in vacation may make . . . such order relative to the expenses of the suit

**§ 856. Same—The husband's income.**—The court should not grant temporary alimony without some proof of the husband's means or ability to earn money, or what was known in the ecclesiastical courts as the husband's "faculties."<sup>1</sup> Generally the affidavits of the wife and of others who are acquainted with the husband will be sufficient.<sup>2</sup> The husband's income should be shown, whether derived from his capital or labor, or both. If he has no property, a portion of his salary will be awarded to the wife. If he is able to earn fair wages, the court may award temporary alimony, although he is unemployed, as the liability to support the wife is a personal liability, in no way dependent upon his income or capital. The husband's poverty will rarely be a defense to the wife's application.<sup>3</sup> Especially where he is plaintiff; for he is not entitled to a divorce if his wife has no opportunity to make a defense.<sup>4</sup> But in our courts the wife may appear as a witness against the husband and defend herself in that way, or the court may appoint an attorney to appear for the wife if the husband is destitute of means to carry on the suit and assist the wife. If the showing of the husband's poverty and inability is so strong that the court is convinced that the order for temporary alimony cannot be complied with, such order should not be made.<sup>5</sup>

as will insure to the wife an efficient preparation of her case and a fair and impartial trial thereof," it is held that a decree dismissing the wife's suit may be modified so as to allow her a further sum for costs and attorney fees. *Davis v. Davis* (Ind.), 40 N. E. 803.

<sup>1</sup> *Butler v. Butler*, 1 Lee, 38. See *contra*, *Schmidt v. Schmidt*, 26 Mo. 235.

<sup>2</sup> *Lilly v. Lilly*, 1 W. N. C. 160; *Miller v. Miller*, 1 W. N. C. 415; *Gaylord v. Gaylord*, 4 Jones' Eq. 74; *Wright v. Wright*, 3 Tex. 168;

*Burgess v. Burgess*, 25 Ill. 525; *Glenn v. Glenn*, 44 Ark. 46. It is error to refuse to hear the husband's testimony concerning his means. *Jenkins v. Jenkins*, 69 Ga. 483.

<sup>3</sup> *Rublinsky v. Rublinsky*, 24 N. Y. Supp. 920; *Lane v. Lane*, 22 Ill. Ap. 529; *Miller v. Miller*, 75 N. C. 70; *Cohen v. Cohen*, 11 Misc. 704.

<sup>4</sup> *Pruzell v. Pruell*, 3 Edw. Ch. 194; *Deemer v. Deemer*, 7 Pa. Co. Ct. Rep. 554.

<sup>5</sup> *Vinson v. Vinson* (Ga.), 19 S. E. 898.

**§ 856a. Defenses to the application.**—The defenses to the application for temporary alimony have already been considered in connection with various topics. It is not a defense that the court has no jurisdiction to award temporary alimony, because the statute is silent as to such power, or because the statute has provided for permanent alimony and not temporary alimony.<sup>1</sup> The denial that a marriage exists, or the allegation in the petition or answer that the marriage is void on account of a prior marriage undissolved, is not a defense.<sup>2</sup> In general, it may be said that a denial of the marriage relation is not a defense because it raises an issue to be tried in the action, and cannot be disposed of on the hearing of the application for temporary alimony. The exception to this rule is where the evidence is not so conflicting that the court may safely determine in advance that the marriage is void or has been dissolved by a valid decree of divorce.<sup>3</sup> For the same reason the denial of a cause for divorce,<sup>4</sup> or the misconduct of the wife,<sup>5</sup> will not be a defense, as this would involve a determination of the merits of the case before the trial. We have seen that the fact that the wife has sufficient income to pay the expenses of the suit and maintain herself during the trial is a defense, as it disproves the necessity for the allowance.<sup>6</sup> But there must be an adequate income. The ownership of property which is not readily convertible into money, or does not yield an adequate income, is not a defense.<sup>7</sup> The fact that the wife has entered into a void marriage, and is supported by one who claims to be her husband; or is living in adultery and is supported by her paramour, will be a defense.<sup>8</sup> The poverty of the husband, if it amounts to an absolute inability to pay alimony, is a defense where the wife is plaintiff. But if he is plaintiff, the rule is otherwise. He is not entitled to a divorce where he cannot pay alimony, and the wife is unable

<sup>1</sup> § 851.

<sup>5</sup> § 857.

<sup>2</sup> § 852.

<sup>6</sup> § 855.

<sup>3</sup> §§ 853, 854.

<sup>7</sup> Id.

<sup>4</sup> § 854.

<sup>8</sup> § 855.

to make a defense.<sup>1</sup> The husband's offer to support the wife during the suit is not a defense.<sup>2</sup>

**§ 857. Same—Misconduct of the wife.**—It is no defense to the application for alimony that the wife has committed adultery, or that she is guilty of such misconduct that the suit must fail. In some instances the courts have refused the order because the wife's adultery was shown by affidavits.<sup>3</sup> The court may refuse alimony in such cases; and such refusal is not reversible error unless it is clear that the discretion has been abused.<sup>4</sup> The misconduct of the wife may be considered by the court in fixing the amount of alimony.<sup>5</sup> It is manifestly improper to try any of the issues of the case upon affidavits; and the courts generally decline to do so. If recrimination is set up by the husband, the wife cannot be condemned without a trial. In general the merits of the case are not examined on an application for temporary alimony.<sup>6</sup> But where it appears that the wife is guilty of desertion, and has not lived with the husband for several years, the court may refuse alimony, but

<sup>1</sup> § 856.

<sup>2</sup> Md. Ch. 341; *Heilbron v. Heilbron*, 158 Pa. 297, 27 A. 967; *Frickel*

<sup>2</sup> § 858.

*v. Frickel*, 4 Misc. 382, 24 N. Y. Supp. 483; *Brinkley v. Brinkley*, 50

<sup>3</sup> *Kock v. Kock*, 42 Barb. 515; *Carpenter v. Carpenter*, 19 How. 539; *Griffin v. Griffin*, 21 How. Pr. 364; *Cook v. Cook*, 12 Canada L. T. 73; *Miller v. Miller*, 2 Kulp, 6; *Andrews v. Andrews*, Dallam (Tex.), 375; *Hill v. Hill*, 47 Ga. 332. See statute in *Lassiter v. Lassiter*, 92 N. C. 129.

<sup>4</sup> *Pettee v. Pettee*, 19 N. Y. Supp. 311.

<sup>5</sup> *Leslie v. Leslie*, 6 Ab. Pr. (N. S.) 193.

<sup>6</sup> *Gruhl v. Gruhl*, 123 Ind. 87, 23 N. E. 1101; *Burgess v. Burgess*, 25 Ill. Ap. 525; *Bowman v. Bowman*, 24 Ill. Ap. 165; *Litowich v. Litowich*, 19 Kan. 451; *Coles v. Coles*,

<sup>2</sup> *Md. Ch. 341; Heilbron v. Heilbron*, 158 Pa. 297, 27 A. 967; *Frickel*

*v. Frickel*, 4 Misc. 382, 24 N. Y. Supp. 483; *Brinkley v. Brinkley*, 50 N. Y. 184; *Nolan v. Nolan*, 1 Chan. Chamb. (Ont.) 368; *Campbell v. Campbell*, 6 Practice Rep. (Ont.) 128; *Vandegrift v. Vandegrift*, 30 N. J. Eq. 76; *Brenner v. Brenner*, 5 Kulp, 6; *Brooks v. Brooks*, 18 W. N. C. 115. See, *contra*, *Dougherty v. Dougherty*, 8 N. J. Eq. 550; *Begbie v. Begbie*, 7 N. J. Eq. 98; *Monk v. Monk*, 7 Rob. (N. Y.) 153. See, also, *Countz v. Countz*, 30 Ark. 73; *Edwards v. Edwards*, Wright, 308; *Wooley v. Wooley*, Wright, 245; *Slack v. Slack*, Dudley (Ga.), 165; *Longfellow v. Longfellow*, Clarke, 344.

will allow her sufficient suit money and attorneys' fees to try the case.<sup>1</sup>

**§ 858. Offer to support wife.**—It is no defense to an application for temporary alimony that the husband offers to support the wife in his own house. It may be true that she has left his home without his fault, and that he is not liable at law for her separate support.<sup>2</sup> It may be that she is in fault; but that is an issue that must await the trial, and should not be determined from the affidavits alone.<sup>3</sup> If in fact the husband is guilty of a cause for divorce, the wife is justified in remaining away, and may refuse the husband's offer of support in his own house.<sup>4</sup> She has a cause for divorce, and may condone it or not, at her election, and is not required to live with her husband under such circumstances.

**§ 859. Amount of temporary alimony.**—The object in granting this kind of alimony is to assist the wife in maintaining herself until the termination of the suit; and the amount should be adequate for this purpose. The amount must be governed by the needs of the wife. If she is accustomed to support herself and is doing so in a manner suited to the circumstances of the parties, there is no necessity for this allowance. If her means are not adequate, the temporary alimony must be sufficient to supply the deficiency. The amount varies with her needs. If she is accustomed to a moderate style of living, the amount should not be greater

<sup>1</sup> *Anthony v. Anthony*, 11 N. J. 108; *Gleason v. Gleason*, 12 W. N. Eq. 70. See, also, cases cited in § 875.

<sup>2</sup> *Culver v. Culver*, 8 B. Monr. 128. See, also, *Rockwell v. Morgan*, 2 Beas. 119.

<sup>3</sup> See *contra*, *O'Hara v. O'Hara*, 12 Pa. Co. Ct. 603.

<sup>4</sup> *Breinig v. Breinig*, 21 Pa. 161; *Johnson v. Johnson*, 125 Ill. 510; *Wolf v. Wolf*, 14 Lan. Bar Rep. 59; *Atkinson v. Atkinson*, 1 L. Val. 149; *Garrettson v. Garrettson*, 14 W. N. C. 566; *Wilson v. Wilson*, 1 L. Val.

194; *Wilson v. Wilson*, 6 Prac. Rep. 129; *Martin v. Martin*, 4 Halst. 563; *Schleifer v. Schleifer*, 19 N. Y. Supp. 973; *Downing v. Downing*, 7 Kulp, 138.

than will support her accordingly, although the husband has a large income. Unless the wife is profligate or has been living beyond her husband's means, she should be allowed sufficient means to continue her accustomed mode of living during the suit. No specific rules have been formulated or followed by our courts in fixing this amount. And in the nature of the case no definite proportion should be adopted, since the court must consider the wealth and social standing of the parties, their manner of living, the present available means of the wife and the ability and income of her husband, her health and probable needs while the suit is pending, and many other circumstances; and from all these the court may estimate what amount, if any, will be necessary to maintain her in a suitable manner during the litigation. Perhaps the most satisfactory rule is that the amount must be sufficient to enable the wife, in addition to her own means, to maintain herself during the suit according to her former manner of living. "The wife should not be placed in a better position than she was in before the suit was instituted."<sup>1</sup>

It is said to be the common rule in England and most of our states "to allow for temporary alimony about one-fifth of the joint income, deducting the wife's separate income. Yet this is subject to be varied with the circumstances."<sup>2</sup> But no such rule is indorsed by our courts; and an examination of later decisions in England will disclose that the amount is determined from the wife's circumstances, and not from the income of the husband. Thus, where the husband has no income, the court may award the wife a suitable allowance.<sup>3</sup> And where the husband has an income the amount is not generally one-fifth of the income, but an allowance according to the wife's needs. To follow such a rule would lead the courts to make absurd allowances and to

<sup>1</sup> George *v.* George, 1 P. & M. 554. & T. 85; Williams *v.* Williams, 29

<sup>2</sup> Bishop, Mar., Sep. & Div., § 952, Wis. 517.

citing Hawkes *v.* Hawkes, 1 Hag. 526; Brisco *v.* Brisco, 2 Hag. 387; Rees *v.* Rees, 8 Phillim. 3 Thompson *v.* Thompson, 1 P. & Ec. 553; Miller *v.* Miller, 75 N. C. 70; Con. 199; Ward *v.* Ward, 29 Ab. N. C. 256; Hayward *v.* Hayward, 1 Swab. Lane *v.* Lane, 22 Ill. Ap. 529.

neglect the exercise of that broad and liberal discretion to adjust the amount according to the circumstances of each case.

As this question cannot be treated in the abstract, some decisions will be noticed here, not as precedents binding upon our courts in similar circumstances, but as illustrations of the considerations which have influenced the courts in estimating the proper amount of temporary alimony. Where the wife had sued her husband for divorce after living apart from him for several years, during which she had employment and continued to be able to support herself, the court refused temporary alimony although the husband received a fair income.<sup>1</sup> To grant her alimony under such circumstances would be to place her in a better position before suit was instituted. In a leading case the wife had been receiving forty pounds per annum under an agreement for separation, but in his suit for divorce she applied for an additional allowance on the ground that the husband had recently acquired a considerable fortune, and his income had increased. But the court refused the application, saying that "if a wife is content to live on a small income for many years, it would be very unfair to the husband that on her being accused of committing adultery she should at once be entitled to a higher rate of allowance than she had previously received."<sup>2</sup> On appeal it was insisted by eminent counsel that the institution of the suit reopened the question of allowance, and she was entitled to the usual proportion of alimony, and that it was a mistake to treat the question of alimony as "one of bare maintenance for the wife; she is entitled to more than a bare maintenance, to a sufficient maintenance in proportion to the husband's means." But the court held that the allowance, having been sufficient in the past, would be sufficient during the suit, as it was not shown that she would be put to any extra expense.<sup>3</sup> The husband's income was not considered in arriving at this conclusion.

<sup>1</sup> George *v.* George, 1 P. & M. 553.      <sup>3</sup> Powell *v.* Powell, 3 P. & M. 186.

<sup>2</sup> Powell *v.* Powell, 3 P. & M. 55.

The amount of temporary alimony must be based upon the actual wants of the wife.<sup>1</sup> The amount should not permit the wife to profit by her separation and suit. If she is allowed greater means than if she had remained with her husband, the precedent may encourage unfounded and vexatious suits and other abuses. The object of the allowance is to support her during the litigation and to permit her to have a fair trial; and this will require an estimate of the amount necessary for her support, and the manner in which she is to live during the suit. The modern rule appears to be that the wife who has separated herself from her husband on account of his misconduct, and has sued him for divorce, is entitled to support according to her station in life and the ability of her husband. This is the legal duty of the husband at all times, and his commission of a matrimonial wrong does not relieve him or justify a smaller allowance. The wife is not required to change her manner of living during the suit. Thus, where the husband is a millionaire and has a net annual income of \$30,000, it is not error to allow the wife \$300 per month, although she might have lived in a modest and economical way on her own means.<sup>2</sup>

In the famous Sharon case the court did not confine the wife to a sum sufficient to meet her actual wants, or to a portion of the husband's income, but considered the sum which she had been receiving from the husband as sufficient to enable her to live in the same position and manner as she was accustomed to before the suit was commenced. In reviewing the order for temporary alimony McKinstry, J., said: "Where the income of the husband is very large, and the parties have publicly lived together in a style conformable

<sup>1</sup> See *Saunders v. Saunders*, 2 Edw. Ch. 491; *Denton v. Denton*, 1 John. Ch. 364; *Forrest v. Forrest*, 5 Bosworth (N. Y.), 672; *Collins v. Collins*, 2 Paige, 9; *Gilbert v. Gilbert*, 15 N. Y. Supp. 822.

<sup>2</sup> *Harding v. Harding*, 144 Ill. 588, reversing *Harding v. Harding*, 40 Ill. Ap. 202, and overruling *Rawson v. Rawson*, 37 Ill. Ap. 491.

to such income, a just allowance would seem to be one sufficient to enable the wife to continue the enjoyment of many luxuries which habit has made apparent necessities; this, however, subject to the limitation that, while her suit is pending, she is to live in the discreet and quiet manner appropriate to those whose domestic relations are being made the subject of public investigation, and without expenditure for mere display or the gratification of personal vanity. In the case now here the plaintiff never enjoyed a portion of the defendant's income accordant with the position of his recognized wife. Assuming every fact in her favor, she was, at the commencement of their relations, willing that the marriage should be kept secret for a definite time, and during that period to live in comparative obscurity upon an allowance of \$500 a month. That large sum (however small a portion of the defendant's actual income) was amply sufficient for her comfortable support, and to supply her with many of the appliances of wealth."<sup>1</sup>

In New York the rule appears to be that the temporary alimony should be confined to the actual wants of the wife, or real necessities of subsistence during the suit, wholly uninfluenced by the wealth or social standing of the husband.<sup>2</sup> Where the husband's annual income was more than \$60,000, the court considered the sum of \$50 per week as more than necessary to support the wife, and reduced the amount to \$30 per week.<sup>3</sup> The court was, no doubt, influenced by the fact that the wife had agreed to live upon that sum at the time of their separation. In an early case in this state \$25 per month was considered too great an award for the wife's support in the city of New York. "As a general rule," it was said, "to guard against any abuse of the privilege of

<sup>1</sup>Sharon *v.* Sharon, 75 Cal. 1, 47. Paige, 267; Morrell *v.* Morrell, 2 Barb. 480; Simmons *v.* Simmons, 2 Rob. 712. But see *contra*, De Llamosas *v.* De Llamosas, 4 Thomp. & C. 574.

<sup>2</sup>Germond *v.* Germond, 4 Paige, 6 Leslie *v.* Leslie, 6 Ab. Pr. (N. S.) 643; Lawrence *v.* Lawrence, 3 193.

the wife to obtain temporary support pending a suit for divorce or separation, and to prevent the bringing of improper suits for the mere purpose of obtaining a support during a protracted litigation, the temporary alimony must be limited to the actual wants of the wife, until the termination of the suit in her favor establishes the fact that she has been abused and is entitled to a more liberal allowance.”<sup>1</sup>

Where the wife was a defendant, the old rule was to allow her only a mere subsistence, with reference to her “former comfortable state.”<sup>2</sup> It was said that the “bringing of the accusation casts a shadow over her which should induce her to live in comparative seclusion and consequent economy until it is removed.”<sup>3</sup> But it is doubtful whether this consideration is of much weight in our courts, as the wife is considered innocent until the contrary appears, and she is entitled to support while the question is in litigation. This doctrine has been denounced as “worthy only of feudal times,” and as “a doctrine practically repudiated by this enlightened age, like many other unjust and cruel rules applicable to women.”<sup>4</sup>

The amount is sometimes influenced by the fact that the wife is plaintiff.<sup>5</sup> Or that the husband has denied the wife’s charges under oath.<sup>6</sup> Or that the husband during the suit has to pay the costs for both, as well as support the wife.<sup>7</sup> The custody of the children cannot be determined on the hearing of the application for temporary alimony. Generally they are permitted to remain with the parent with whom they resided at the commencement of the suit. In

<sup>1</sup> Germond *v.* Germond, 4 Paige, 643.

<sup>2</sup> Smith *v.* Smith, 2 Phillim. 152; Cooke *v.* Cooke, 2 Phillim. 40.

<sup>3</sup> Hawkes *v.* Hawkes, 1 Hag. Ec. 526.

<sup>4</sup> Dissenting opinion of Barrett, J., in Leslie *v.* Leslie, 6 Ab. Pr. (N. S.) 193.

<sup>5</sup> Amos *v.* Amos, 4 N. J. Eq. 171.

<sup>6</sup> Story *v.* Story, Walk. (Mich.) 421; De Llamosas *v.* De Llamosas, 4 Thomp. & C. 574. But see *contra*, Moriarity *v.* Moriarity, 10 N. Y. Supp. 228; Rawson *v.* Rawson, 37 Ill. Ap. 491.

<sup>7</sup> Brisco *v.* Brisco, 2 Hag. Con. 199; Harris *v.* Harris, 1 Hag. Ec. 351.

some instances the fact that the children reside with their mother may be considered, and the amount is increased for their support during the suit.<sup>1</sup> The wife's health may render an increased allowance necessary, and this may be considered in fixing the amount.<sup>2</sup> The amount should be increased or diminished during the suit, if circumstances require it.<sup>3</sup> The amount should not be generous, for it is only for a short time and a temporary purpose. If it is too low, the amount may be increased at any time upon a showing of the necessity.

If the husband insists that the amount is too large, the court may grant another hearing and adjust the amount according to the circumstances. Where the husband is ready for trial, and the wife delays the same by demanding a change of venue, or a continuance, or a trial by jury, the court, in granting her request, may excuse the husband from the payment of *ad interim* alimony. Such alimony is not a matter of strict right, but of sound discretion.<sup>4</sup>

**§ 860. When temporary alimony commences and terminates.**—The purpose of temporary alimony being the support of the wife during the suit and a provision for her expenses, the aid should commence and terminate with the necessity for it. Ordinarily this kind of alimony dates from the commencement of the suit.<sup>5</sup> In ecclesiastical practice

<sup>1</sup> *Umlauf v. Umlauf*, 22 Ill. Ap. 404; *Bay's Appeal*, 6 A. 40; *Van Wormer v. Van Wormer*, 11 N. Y. Supp. 487; *Lynde v. Lynde*, 4 Sandf. 373; *Harding v. Harding*, 40 Ill. Ap. 202, reversed 144 Ill. 588; *Potts v. Potts*, 68 Mich. 492, 36 N. W. 240; *Williams v. Williams*, 29 Wis. 517.

<sup>2</sup> *Schammel v. Schammel*, 74 Cal. 36, 15 P. 364; *Lynde v. Lynde*, 4 Sandf. 373, affirmed in 2 Barb. Ch. 72.

<sup>3</sup> *Leslie v. Leslie*, 11 Ab. Pr. (N. S.) 311; *Hardy v. Hardy*, 6 N. Y. Supp. 300; *Sheckles v. Sheckles*, 3 Nev.

<sup>4</sup> *Sigel v. Sigel*, 19 N. Y. Supp. 906, 28 Ab. N. C. 302; *Walker v. Walker*, 10 Practice Rep. (Ont.) 633; *Williams v. Williams*, 29 Wis. 517.

<sup>5</sup> *Forrest v. Forrest*, 3 Bosw. 661; *Burr v. Burr*, 7 Hill, 207; *Leslie v. Leslie*, 6 Ab. Pr. 193; *Howe v. Howe*, 3 Chy. Chamb. (Ont.) 494; *Ricketts v. Ricketts*, 4 Gill, 105.

the temporary alimony generally dates back to the return of the citation; for until then the wife might obtain subsistence upon her husband's credit.<sup>1</sup> But the court, in its discretion, might fix the date when this alimony should commence—at the time the citation was issued, or at some later date, according to the circumstances of the parties and the date of the application.<sup>2</sup> In modern practice the date when the temporary alimony commences is fixed in the order, and this date is generally the day the order is granted.<sup>3</sup>

Temporary alimony ceases upon the entry of a final judgment.<sup>4</sup> The suit is no longer pending, and the necessity for alimony and suit money is terminated. If a motion for a new trial is pending, or an appeal has been taken from the decree of divorce, the temporary alimony would continue.<sup>5</sup> It appears to be the rule in England that temporary alimony ceases upon the verdict of a jury finding the wife guilty of adultery.<sup>6</sup> But the court has the power to continue the alimony, if it is made to appear that she has good cause for a new trial.<sup>7</sup> The order for temporary alimony may provide that the same shall continue in force until a final decree is rendered. But the failure to so limit the time will not render the order erroneous, as, by necessary implication, the order ceases to have any force or effect after a final decree.<sup>8</sup> Where the wife's petition is dismissed for failure to prove a cause for divorce, the order for temporary alimony is thereby annulled, and the wife cannot recover any amount which may be due at the time.<sup>9</sup> If the decree for temporary ali-

<sup>1</sup> *Loveden v. Loveden*, 1 Phillim. 208.

<sup>2</sup> *Loveden v. Loveden*; 1 Phillim. 208; *Rees v. Rees*, 3 Phillim. 387.

<sup>3</sup> In New York it can only be allowed from the time that the notice of application was served. *Thrall v. Thrall*, 31 N. Y. Supp. 591, 83 Hun, 189.

<sup>4</sup> *Moncrief v. Moncrief*, 15 Abb. Pr. 187; *Germond v. Germond*, 1 *Paige*, 83.

<sup>5</sup> *Dawson v. Dawson*, 37 Mo. Ap. 207.

<sup>6</sup> *Wells v. Wells*, 3 Swab. & T. 542. But see *contra*, *Stanford v. Stanford*, 1 Edw. Ch. 316.

<sup>7</sup> *Dunn v. Dunn*, 18 P. D. 91.

<sup>8</sup> *Langan v. Langan*, 91 Cal. 654, 27 P. 1092.

<sup>9</sup> *Wright v. Wright*, 6 Tex. 29; *O'Haley v. O'Haley*, 31 Tex. 502.

mony conflicts with the terms of the decree for permanent alimony, the latter decree will prevail as a final adjustment of the matter.<sup>1</sup> Upon the determination of the case upon appeal or by entry of a final judgment of any kind, the order for temporary alimony terminates. If no alimony has been paid on the order, and the husband appealed from the order, a dismissal of the wife's suit because no marriage existed will operate to vacate the order, and no arrears of alimony can be recovered.<sup>2</sup>

**§ 861. How enforced.**—An order for temporary alimony may be enforced by execution, sequestration, or by proceedings in contempt.<sup>3</sup> But during the suit the court has the power to enforce its orders by declaring the husband in contempt and refusing to proceed with the cause until its order is complied with.<sup>4</sup> In some instances the courts have dismissed his petition for a failure to comply with its orders.<sup>5</sup> It is error to refuse a matter of right, such as a change of venue, until the temporary alimony is paid.<sup>6</sup> It is doubtful if the court should refuse to enter a decree of divorce until the temporary alimony is paid. But in some instances this practice has been approved.<sup>7</sup> In many instances the husband's answer has been stricken out for his disobedience of the orders of the court.<sup>8</sup> But this is now considered against

<sup>1</sup> *Driver v. Driver* (Ga.), 21 S.E. 154. s. c., 8 Ab. N. Cas. 436, 20 Hun, 400.

<sup>2</sup> *Sharon v. Sharon*, 84 Cal. 424. 59 How. Pr. 476; *McCrea v. McCrea*,

<sup>3</sup> See Permanent alimony, § 939. 58 How. Pr. 220; *Quigley v. Quigley*, 45 Hun, 23; *Brisbane v. Brisbane*, 67 How. Pr. 184; *Clark v. Clark*, 13 Daly, 497; *Zimmerman v. Zimmerman*, 7 Mont. 114, 14 P. 665; *Farnham v. Farnham*, 9 How. Pr. 231; *Bird v. Bird*, 1 Lee, 572; *Cason v. Cason*, 15 Ga. 405; *Gant v. Gant*, 19 Humph. (Tenn.) 464.

<sup>4</sup> *Keane v. Keane*, 3 P. & M. 52; *Winter v. Supr. Ct.*, 70 Cal. 295, 11 P. 630; *Johnson v. Superior Ct.*, 63 Cal. 578.

<sup>5</sup> *Casteel v. Casteel*, 38 Ark. 477; *Newhouse v. Newhouse*, 14 Or. 290.

<sup>6</sup> *Hennessy v. Nichol* (Cal.), 38 P. 649.

<sup>7</sup> *State v. St. Louis Ct. of Ap.*, 99 Mo. 216, 12 S. W. 661; *Latham v. Latham*, 2 Swab. & T. 299; *Foster v. Redfield*, 50 Vt. 285.

<sup>8</sup> *Walker v. Walker*, 82 N. Y. 260; *Weidner v. Weidner*, 85 Hun, 432.

public policy; for it prevents that full investigation into the merits of the controversy which is necessary to protect the interest of the state.<sup>1</sup> And for the same reason the husband's exceptions should not be dismissed on appeal for failure to pay alimony.<sup>2</sup> But the supreme court may refuse to modify a decree for permanent alimony until the decree for temporary alimony is satisfied.<sup>3</sup>

**§ 862. Appeal.**—The action of the court in granting or refusing temporary alimony, although discretionary, is nevertheless subject to review.<sup>4</sup> In some states the order for temporary alimony and suit money is held to be a mere interlocutory order, and not reviewable until a final judgment is rendered.<sup>5</sup> But the true doctrine is that such order is itself a final judgment. It is a decree for a specific sum payable absolutely. An execution may issue upon this order, or payment be enforced by sequestration of real or personal estate. If the husband wilfully refuses to comply with the order, the decree may be enforced by attachment for contempt. If there is no appeal, there is no remedy against this judgment for the payment of money, no matter how unjust and oppressive the order may be. The money recovered from the husband by execution or other means is paid to the parties in whose favor it was awarded, and passes beyond the control of the court, and cannot be recovered if the appellate court should reverse or modify the order. The weight of authority is that such order may be stayed by the execu-

<sup>1</sup> *Gordon v. Gordon*, 141 Ill. 160, *Lapham v. Lapham*, 40 Mich. 527; 30 N. E. 446; *s. c.*, 41 Ill. Ap. 137; *Aspinwall v. Aspinwall*, 18 Neb. *Peel v. Peel*, 50 Ia. 522; *Allen v. Allen*, 72 Ia. 502; *Baily v. Baily*, 69 Ia. 77.

<sup>2</sup> *Dwelly v. Dwelly*, 46 Me. 377–381.

<sup>3</sup> *Williams v. Williams* (S. D.), 61 N. W. 38.

<sup>4</sup> See *contra*, *Call v. Call*, 65 Me. 407.

<sup>5</sup> *Earls v. Earls*, 26 Kan. 178; *Cooper v. Mayhew*, 40 Mich. 528; *Froman v. Froman*, 53 Mich. 581; 138 Ill. 511.

tion of a suitable undertaking, and the case may be reviewed without awaiting a final decree in the action for divorce.<sup>1</sup> The undertaking must conform to the provisions of the code,<sup>2</sup> and should be in double the amount of the order for a reasonable time within which the appeal can be determined, and for costs.<sup>3</sup> After the filing of such undertaking the court may make another order compelling the husband to pay costs and attorney fees to enable the wife to resist the appeal.

Ordinarily the court will not disturb the order unless there has been an abuse of discretion or an error in law, or the lower court has overlooked or disregarded some important element in the case, to the manifest injury of one of the parties.<sup>4</sup>

Discretion is said to be abused whenever in its exercise "a court exceeds the bounds of reason."<sup>5</sup> No partiality must be shown, and no material consideration disregarded. When, in view of all the circumstances, the amount is largely in excess of the wife's needs, or greatly inadequate, or the husband's rights have been overlooked, or the amount is in excess of his ability to pay, the order may be said to be an abuse of discretion. The order must be so extravagant as to show that there was some mistake either in the method of the calculation or the proportion awarded. The appellee

<sup>1</sup> *Sharon v. Sharon*, 67 Cal. 185; *Murray v. Murray*, 84 Ala. 363; *Collins v. Golding*, 74 Mo. 123; *Blake v. Blake*, 80 Ill. 523; *Lochnane v. Lochnane*, 78 Ky. 467; *Hecht v. Hecht*, 28 Ark. 92; *Casteel v. Casteel*, 38 Ark. 477; *Blair v. Blair*, 74 Ia. 311; *Williams v. Williams*, 29 Wis. 517; *Reed v. Reed*, 17 O. St. 563; *King v. King*, 38 O. St. 370; *State v. Seddon*, 93 Mo. 520; *Finklestein, In re*, 13 Mont. 425.

<sup>2</sup> *Cowan v. Cowan*, 19 Colo. 315.

<sup>3</sup> For form of undertaking held sufficient, see *Sharon v. Sharon*, 68 Cal. 326.

<sup>4</sup> *Williams v. Williams*, 29 Wis. 517; *Sumner v. Sumner*, 54 Wis. 642; *White v. White*, 73 Cal. 105; *Schammel v. Schammel*, 74 Cal. 36;

<sup>5</sup> *Sharon v. Sharon*, 75 Cal. 1, 48.

late court should not interfere with the order merely because in a particular case the court might in its own discretion have reached a different conclusion.<sup>1</sup> But some of our appellate courts exercise considerable freedom in modifying the amount of alimony.

Where there has been an abuse of discretion the order may be reversed, or, upon a review of the decree of divorce, the appellate court may correct the amount and make an additional allowance.<sup>2</sup> On reversal the court may order a restitution of the amounts paid.<sup>3</sup> But it would seem that counsel fees and costs should not be returned after the services are rendered.<sup>4</sup>

**§ 863. Temporary alimony on appeal.**—It is clear that a wife destitute of means is entitled to temporary alimony and attorney's fees during an appeal, whether the appeal is taken by herself or her husband.<sup>5</sup> The action is still pending, and the necessity for the allowance continues until the final decree is rendered.<sup>6</sup> But which court has jurisdiction to make the order for temporary alimony and suit money? Has the lower court power after the appeal is perfected? The courts have reached a variety of conclusions on this question. As a matter of convenience the lower court should retain the jurisdiction until the appeal is determined. Such court is convenient; has in its records the showing as to the wife's needs and the husband's ability; has, perhaps, already determined a proper allowance for the wife; can make additional allowance as the necessity arises; and is, in most cases, near the husband and can enforce its

<sup>1</sup> *Powell v. Powell*, 3 P. & M. 186.

<sup>2</sup> *Brenig v. Brenig*, 26 Pa. 161; *Powers' Appeal*, 120 Pa. 320; *Whitsell v. Whitsell*, 8 B. Mon. 50; *Edwards v. Edwards*, 84 Ala. 361, 3 So. 896; *Jenkins v. Jenkins*, 91 Ill. 167; *S. v. Rombauer*, 99 Mo. 216; *Champlin v. Champlin*, 42 Ia. 169.

<sup>3</sup> *Mullin v. Mullin*, 60 N. H. 16. See, also, *Persons v. Persons*, 26 Tenn. 188.

<sup>4</sup> See *Jenkins v. Jenkins*, 91 Ill.

167; *Grauer v. Grauer*, 2 Misc. 98, 20 N. Y. Supp. 854; *Wuest v. Wuest*, 17 Nev. 217; *Lishey v. Lishey*, 74 Tenn. 418.

<sup>5</sup> There must be a showing of prejudicial error if wife appeals. § 854.

<sup>6</sup> *Forrest v. Forrest*, 5 Bos. 672.

orders without great expense or delay. On the contrary, the whole power should not be delegated to the lower court, for during the pendency of the appeal the appellate court may find it necessary to change the amount of alimony and suit money and to make further orders concerning the same. Where the practice is not controlled by statute, the ordinary rules of practice, as well as plain principles of law, would suggest that the jurisdiction of the lower court is lost when the appeal is perfected.<sup>1</sup> Before the appeal is perfected the lower court has the power to award alimony and any sum of money necessary to enable the wife to prepare the case for appeal, including clerks' and reporters' fees, the cost of printing the record, etc., and a suitable attorney fee for making such preparation.<sup>2</sup> When the appeal is perfected all proceedings in the lower court are stayed, and the application must be made to the appellate court, which now has complete jurisdiction over the parties.<sup>3</sup> Upon reversal the lower court will obtain jurisdiction over the parties again, and may make further orders concerning alimony and attorney fees.<sup>4</sup> The appellate court has the inherent power to allow alimony and counsel fees, although not authorized by any statutory provision on the subject; for the jurisdiction to review decrees of divorce carries with it, by implication, the incidental power to make such allowances.<sup>5</sup> But this power has been denied by some of the appellate courts.<sup>6</sup>

<sup>1</sup> *Cralle v. Cralle*, 81 Va. 773; *Jenkins v. Jenkins*, 91 Ill. 167; *State v. Phillips*, 32 Fla. 403. See *contra*, *Rohrback v. Rohrback*, 75 Md. 317, 23 A. 610.

<sup>2</sup> *Butler v. Butler*, 15 P. D. 13; *Jones v. Jones*, 2 P. D. 333.

<sup>3</sup> See *Goldsmith v. Goldsmith*, 6 Mich. 285; *Van Voorhis v. Van Voorhis*, 90 Mich. 276; *Stafford v. Stafford*, 53 Mich. 522; *Skillman v. Skillman*, 18 Mich. 458; *Chaffee v. Chaffee*, 14 Mich. 463; *Hoff v. Hoff*, 48 Mich. 281; *Zeigenfuss v. Zeigenfuss*, 21 Mich. 414; *Keel v. Keel*,

*King's Digest* (Tenn.), 933; *Copeland v. Copeland*, id. 934; *Pleyte v. Pleyte*, 15 Colo. 125, 25 P. 25; *Helden v. Helden*, 9 Wis. 508; *Krause v. Krause*, 23 Wis. 354; *Phillips v. Phillips*, 27 Wis. 252; *Coad v. Coad*, 40 Wis. 392.

<sup>4</sup> *Shy v. Shy*, 54 Tenn. 125; *Wagner v. Wagner*, 36 Minn. 239.

<sup>5</sup> *Lake v. Lake*, 16 Nev. 364, 17 Nev. 230, 30 P. 878. Approved in dissenting opinion, *Ex parte Winter*, 70 Cal. 291.

<sup>6</sup> *Kesler v. Kesler*, 39 Ind. 153; *S. v. St. Louis Ct. Ap.*, 88 Mo. 135;

The form of the statute providing for temporary alimony in the lower court is sometimes held to prohibit the appellate court from exercising such power. Thus the California Code provides that, "when an action for divorce is pending, the court may, in its discretion, require the husband to pay, as alimony, any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." This section evidently refers to the lower court, but certainly does not authorize such court to grant alimony after it has lost jurisdiction by appeal. The court referred to must be one having jurisdiction. "The legislature," it is said, "did not intend to extend the jurisdiction of the district court to matters affecting the appellate court alone."<sup>1</sup> But it is held that such statute contemplates that the lower court may exercise this power so long as the action is "pending," whether in the lower or in the appellate court.<sup>2</sup> A similar statute has received the same construction in New York and Illinois.<sup>3</sup> These authorities do not deny that the appellate court may make further orders in the case in disposing of it. In fact, it must be conceded that the appellate court at all times retains its inherent power to compel the husband to furnish the wife the means to prosecute or defend the appeal, and that such court cannot be deprived of such power without express prohibition.

S. v. St. Louis Ct. Ap., 99 Mo. 216. But see, also, Lewis v. Lewis, 20 Mo. Ap. 546; Clarkson v. Clarkson, 20 Mo. Ap. 94; Miller v. Miller, 14 Mo. Ap. 418; Dwyer v. Dwyer, 16 Mo. Ap. 422. Where the lower court allowed alimony after the appeal was perfected the supreme court will not review such order. Edwards v. Edwards, 80 Ala. 97.

<sup>1</sup> Lake v. Lake, 17 Nev. 230.

<sup>2</sup> Bohnert v. Bohnert, 91 Cal. 428, 27 P. 732; *Ex parte* Winter, 70 Cal.

291; Larkin v. Larkin, 71 Cal. 330; Reilly v. Reilly, 60 Cal. 624; Wolff v. Wolff (Cal.), 37 P. 858.

<sup>3</sup> McBride v. McBride, 119 N. Y. 519, 23 N. E. 1065, affirming 55 Hun, 401, and overruling McBride v. McBride, 6 N. Y. Supp. 447; Fagan v. Fagan, 39 Hun, 531; Winter v. Winter, 31 Hun, 290. See, also, Anonymous, 15 Ab. Pr. (N. S.) 307; Halstead v. Halstead, 11 Misc. 592; Jenkins v. Jenkins, 91 Ill. 167; Hunter v. Hunter, 100 Ill. 477.

## SUIT MONEY AND ATTORNEY'S FEES.

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### § 875. In general.

876. Action at law for attorney's fees.  
877. How obtained after dismissal.

### § 878. Number of counsel.

879. Amount of attorney's fees.  
880. The order for attorney's fees.  
881. Contingent fee.  
882. Attorney's lien.

**§ 875. In general.**—The term suit-money is broad enough to include attorney's fees and all costs and expenses of the divorce proceeding. The rules for the application and practice in granting suit-money do not differ materially from those governing temporary alimony. Suit-money is in fact a specific part only of the temporary alimony, and is granted under the same conditions. It is likewise subject to the order of the court, and may, at its discretion, be increased or diminished with the varying necessities of the case.<sup>1</sup> The power to award suit-money in an action for divorce is generally derived from the general terms of the statutes which refer to temporary alimony.<sup>2</sup> But in the absence of statutory provision it is universally held that the courts possess such power as an incident of the jurisdiction to render decrees of divorce and alimony.<sup>3</sup> Suit-money and attorney's fees are allowed or refused under the same circumstances or

<sup>1</sup> *Donelly v. Donelly*, 63 How. Pr. 481; *Schloemer v. Schloemer*, 49 N. Y. 82; *Winton v. Winton*, 12 Ab. N. Cas. 159; *Winton v. Winton*, 31 Hun, 290; *Beadleston v. Beadleston*, 103 N. Y. 402, 8 N. E. 735; *Poutney v. Poutney*, 10 N. Y. Supp. 192; *Stampfer v. Stampfer*, 11 N. Y. Supp. 558; *Van Wormer v. Van Wormer*, 11 N. Y. Supp. 247.

<sup>2</sup> See statutes referred to in Mc-

*Quien v. McQuien*, 61 How. Pr. 280; *Green v. Green*, 40 How. Pr. 465; *Meyar v. Meyar*, 3 Met. 298; *Nikirk v. Nikirk*, 3 Met. 433; *Williams v. Monroe*, 18 B. Mon. 514; *Burnham v. Tizard*, 31 Neb. 781, 48 N. W. 823; *Thomas v. Thomas*, 7 Bush, 665.

<sup>3</sup> *Lake v. Lake*, 16 Nev. 363; *Black v. Black*, 5 Mont. 15; *Lamy v. Catron* (N. Mex.), 23 P. 773.

upon the same showing as temporary alimony. Generally, both are allowed in the same order and upon the same showing. In some instances attorney's fees have been allowed although temporary alimony was refused.<sup>1</sup> The application may be denied if counsel have agreed to render their services gratuitously.<sup>2</sup> The application for attorney's fees should be made as soon as it appears that the wife cannot pay the same out of her separate means. Such application may, however, be made at any stage of the proceeding, after dismissal, or after a verdict against the wife, if she desires to appeal.<sup>3</sup> The amount of attorney's fees may be increased, and if an appeal is taken an additional amount is sometimes allowed, as the first allowance does not contemplate any services after the decree is rendered.

The order of court granting or refusing attorney's fees is a final order, and is a conclusive adjudication of the question, both as to the parties and the attorney. This must be true, for from the nature of the case the court has jurisdiction of the parties and passes upon the merits of the case in determining the amount which shall be paid, as well as the necessity of such payment. After the court has granted or refused attorney's fees, its action may be reviewed by the appellate court, but otherwise it is a complete adjudication.<sup>4</sup> If additional services are rendered the attorney must apply to the court for compensation. He cannot recover such compensation in an action at law.<sup>5</sup> This doctrine is denied

<sup>1</sup> See *Miller v. Miller*, 43 How. Pr. 125; *McDonough v. McDonough*, 26 How. Pr. 193; *Anonymous*, 15 Ab. Pr. (N. S.) 307; *Anthony v. Anthony*, 11 N. J. Eq. 70; *Douglas v. Douglas*, 13 Ab. Pr. (N. S.) 291. Attorney's fees are granted where the wife is able to support herself and has a residence of her own. She is not required to reduce her capital where her income is insufficient to pay the fees and the husband has ample means. *Shaw v. Shaw*, 5 Misc. 497; *Sinn v. Sinn*, 3 Misc. 598.

<sup>2</sup> *Mudd v. Mudd*, 98 Cal. 320, 38 P. 114.

<sup>3</sup> See *Van Driele v. Van Driele*, 58 Mich. 273; *Cooke v. Newell*, 40 Conn. 596.

<sup>4</sup> *Dow v. Eyster*, 79 Ill. 254; *Robertson v. Artz*, 38 Ill. Ap. 593; *Green v. Green*, 40 How. Pr. 465; *McCabe v. Britton*, 79 Ind. 224; *Adams v. Adams*, 49 Mo. Ap. 592.

<sup>5</sup> *Burnham v. Tizard*, 31 Neb. 781,

in Iowa, where it is held that proof of the order for attorney's fees and payment is not a sufficient bar in a separate action for additional compensation. "These orders," it is said, "are usually made to continue from term to term, for the reason that it is impossible to determine at the beginning what the necessities of the case may require. It may continue for years, and the court cannot determine in advance that any named sum of money ought to be a full allowance for all purposes. This being the nature of the proceeding, no mere temporary order can be said to be a final adjudication."<sup>1</sup> But the question of additional compensation might have been determined in the suit for divorce, and such question is, therefore, not open to investigation in another action, for the rule of *res adjudicata* extends to all questions which might have been determined in the action. The plea of *res adjudicata* cannot be sustained where the services were rendered in preparing a suit for divorce, which is settled by the parties before the action is commenced; and where the action is dismissed by the collusive agreement of the parties, to avoid paying the fees of the attorney for the wife, before an application for temporary alimony was made. It is held in some states that the fees may be recovered in a separate action. It is clear, however, that such dismissal might be set aside, and an application for attorney's fees may be made and determined in the suit for divorce, if the rules of practice will permit.

**§ 876. Action at law for attorney's fees.**—Whether the husband is liable in an action at law for services rendered the wife in preparing and conducting a suit for divorce is a controverted question. The English doctrine is that he is liable for such services if the suit is conducted in good faith and on probable cause. It is held that the wife has authority to pledge her husband's credit for the cost of a divorce suit where there was probable grounds for instituting the

48 N. W. 828; *Clarke v. Burke*, 65 also, to the same effect, *Ottaway v. Hamilton*, 3 C. P. D. 393.  
Wis. 359.

<sup>1</sup> *Clyde v. Peavy*, 74 Ia. 47. See,

suit, for the proceeding is necessary for the wife's protection. "Where there is reasonable apprehension of violence," said Crompton, J., "a divorce may be the most effectual protection, and it may be a necessary within the rule which authorizes a wife, who has left her husband from apprehension of cruelty, to pledge his credit for what is necessary to her."<sup>1</sup> The services and expenses of an attorney have been held necessaries in suits other than divorce: such as reasonable legal expenses incurred by defending a wife in a prosecution instituted by the husband;<sup>2</sup> or in prosecuting the husband where the wife files a complaint against him for a breach of the peace.<sup>3</sup> It was the opinion of Lord Ellenborough that in such a case "she carried along with her a credit for whatever her preservation and safety required. She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might therefore charge her husband with the expense of the proceeding, as much as for the necessary food and raiment."<sup>4</sup> And upon the same principle he is liable for services rendered the wife in a suit against him to enforce an agreement to make a marriage settlement,<sup>5</sup> or to recover separate maintenance.<sup>6</sup>

<sup>1</sup> *Brown v. Ackroyd*, 5 Ellis & Bl. 819; followed by *Rice v. Shepherd*, 12 C. B. (N. S.) 332, and *Wilson v. Ford*, L. R. 3 Ex. 63. It will be noticed in these cases that the counsel might have obtained his fees by application to the divorce court, so that the husband is liable in the action at law as well as in the divorce suit. *Ottaway v. Hamilton*, 3 C. P. D. 393.

<sup>2</sup> *Wilson v. Ford*, L. R. 3 Ex. 63; *Warner v. Heiden*, 28 Wis. 517; *Barker v. Hibbard*, 54 N. H. 539; *Robertson v. Artz*, 38 Ill. Ap. 593; *Turner v. Rookes*, 10 Adolphus & Ellis, 47.

<sup>3</sup> *Morris v. Palmer*, 39 N. H. 123;

*Williams v. Fowler*, McClel. & Y. 269; *Turner v. Rookes*, 10 A. & E. 47.

<sup>4</sup> *Shepherd v. Mackoul*, 3 Camp. 326. In some instances the husband is not liable for the services of private counsel who assisted the prosecuting attorney, as such services may be unnecessary. The state, and not the husband, is liable in such cases. See *McQuhae v. Rey*, 2 Misc. R. (N. Y.) 476, 22 N. Y. Supp. 175, 3 Misc. 550; *Grindell v. Godmand*, 2 Har. & W. 339.

<sup>5</sup> *Wilson v. Wilson*, 1 Des. 219.

<sup>6</sup> *Bueter v. Bueter*, 1 S. Dak. 94, 45 N. W. 208.

The general rule for determining what are necessaries for the wife has been stated in a recent case in Massachusetts, it which it is held that "whatever actually and reasonably tends to relieve distress, or materially and in some essential particular to promote comfort, either of body or mind, may be deemed a necessary for which a wife, under proper circumstances, may pledge her husband's credit. . . . Approximation may sometimes be made by holding that certain articles or services are to be deemed outside of any reasonable construction of the term. But legal services do not fall within such universal or general exclusion. There may be occasions when such services are absolutely essential for the relief of a wife's physical or mental distress. Suing out a writ of *habeas corpus* to deliver herself from unjust or illegal imprisonment is an illustration of the rule."<sup>1</sup>

It may be considered well-established law that legal services rendered the wife are within the definition of necessities, and it is difficult to assign any good reason why such services, when rendered in a suit for divorce, are not necessities. The relief demanded is a legal separation or a dissolution of the marriage, and the division of the property or suitable alimony. The law recognizes the liability of the husband to furnish her the necessary means to enforce or defend her marital rights in the divorce suit, and compels him by summary methods to furnish such means. The necessity of such legal services is so manifest in the proceeding for divorce as to admit of no argument. It is a presumption of law that such services are necessary, and attorney's fees are allowed upon proof that the wife has a probable cause for divorce, and that she has not sufficient means to prosecute the suit, while her husband has property. If, under proper circumstances, legal services are necessities within the definition of that term at common law, it must follow that such services are necessities in actions to obtain a separate maintenance, or alimony without divorce, or even a dissolution of the marriage.

<sup>1</sup> Conant *v.* Burnham, 133 Mass. 505.

In some of our states the courts have followed the English doctrine that the usual method of obtaining attorney fees in the action for divorce is not exclusive, but that when the divorce suit is no longer pending, or the services were rendered in preparing a suit which was not commenced, the attorney for the wife may recover the value of his legal services in an action at law.<sup>1</sup> And this is deemed to be the better doctrine, as it is in accord with the principles of the common law.

But it is held by the greater number of American authorities that legal services rendered the wife in prosecuting or defending a suit for divorce are not such necessaries as the law requires the husband to furnish, and that he is not liable for such services in an action at law.<sup>2</sup> The early cases seem to have considered a divorce suit as unnecessary for the protection of the wife, and held such proceedings as a kind of luxury, tending to promote discord and the destruction of the marriage relation. The most cogent reason that was assigned was that "the duty of providing necessaries for the wife is strictly marital, and is imposed by the common law in reference only to a state of coverture and not of divorce. By that law the contract of marriage was and is indissoluble, and therefore by it the husband could never have been placed under obligation to provide for its dissolution. Such an event was a legal impossibility."<sup>3</sup> But this reason is not

<sup>1</sup> *Porter v. Briggs*, 38 Ia. 166; *Newell*, 40 Conn. 596; *Dow v. Eyster*, 79 Ill. 254; *Stein v. Blake*, 56 Ill. 525; *Phillips v. Simmons*, 11 Ab. Pr. (N. Y.) 288; *Williams v. Monroe*, 18 B. Mon. 514; *Dorsey v. Goodenow*, Wright, 120; *Johnson v. Williams*, 3 G. Greene (Ia.), 97; *McCulloch v. Robinson*, 2 Ind. 630; *Coffin v. Dunham*, 62 Mass. 404; *Thompson v. Thompson*, 40 Tenn. (3 Head), 527; *Pearson v. Darrington*, 32 Ala. 229.

<sup>2</sup> *Wing v. Hurlburt*, 15 Vt. 607; *Kincheloe v. Merriman*, 54 Ark. 557; *Clarke v. Burke*, 65 Wis. 359; *Morrison v. Holt*, 42 N. H. 478; *Ray v. Adden*, 50 N. H. 82; *Cooke v.*

<sup>3</sup> *Shelton v. Pendleton*, 18 Conn. 417, approved in *Clarke v. Burke*, 65 Wis. 359.

altogether satisfactory, since the principles of the common law are applicable to new and anomalous conditions created by statute. If legal services rendered in a suit for separation are necessaries, it would seem to follow that such services in a suit for a dissolution would be necessaries within the reason and policy of the common law, as the liability was created before the marriage was dissolved.<sup>1</sup>

The liability of the wife for the services of an attorney is clear where she is permitted to contract with reference to her separate property by that form of statute known as the Married Women's Act. And it is held in a recent case that a married woman may bind herself for the services of an attorney rendered in preparing and commencing a suit for divorce which was afterwards discontinued at her request before any allowance was made for her attorney. It was contended in her behalf that her husband was liable, and that such services were not rendered with reference to her separate estate; but this was denied on the ground that the statute contemplated her right to sue and her liability for the costs unless the court made the husband liable therefor in the divorce suit. "The statute," it was said, "clearly indicates that such proceedings are to be maintained at the cost of the wife, unless the court shall relieve her of such cost by an order for expense money to be paid by her husband. It has also been held in this state that a married woman is competent to assert her rights either as plaintiff or defendant, and, where a suit is brought against her as defendant, is bound to do so.<sup>2</sup> It would seem to follow logically that, having the power to bring suit, and being in such suit responsible for costs, she must be held competent to contract for the services of an attorney to represent her rights. We

<sup>1</sup> A married woman cannot bind herself at common law to pay for the services of an attorney in a divorce suit whether she is plaintiff or defendant. *Cook v. Walton*, 38 Ind. 228; *McCabe v. Britton*, 79 Ind. 224; *Viser v. Bertrand*, 14 Ark. 267.

And her promise cannot be enforced after the marriage is dissolved by divorce. *Musick v. Dobson*, 76 Mo. 624; *Putnam v. Tennyson*, 50 Ind. 456.

<sup>2</sup> *Wilson v. Coolidge*, 42 Mich. 112.

think the right to contract for such services is necessarily incident to and included in her right to bring the suit.”<sup>1</sup>

**§ 877. How obtained after dismissal.**—Frequently family quarrels and the divorce suits which grow out of them are settled by the parties, and the action dismissed without notice to the wife's attorney, and without paying the attorney for his services. It then becomes a difficult question how to proceed to recover the fees which are equitably due. Where, as in England, the action cannot be dismissed without the action of the court, the order of dismissal will not be rendered until the attorney is paid.<sup>2</sup> Where attorneys have notice of the dismissal and oppose it because their fees are not paid, the court should allow them a reasonable fee based upon the services already rendered, but in some instances the courts have declined to do this.<sup>3</sup> It is clear that after an order for attorney's fees have been entered, the voluntary dismissal of the suit by the wife will not invalidate such order.<sup>4</sup> But the fact that the action is dismissed may be urged to diminish the amount ordered, since all the services contemplated, such as preparing the evidence and conducting a trial, have not been rendered.<sup>5</sup>

The attorney who appears for the wife and does not look to her for compensation for his services has a right to proceed in the case with the assurance that a suitable fee will

<sup>1</sup> *Wolcott v. Patterson*, 100 Mich. 227, 58 N. W. 1006. The statute referred to is as follows: 2 How. Ann. St., § 6235: “In every suit brought, either for a divorce or for a separation, the court may in its discretion require the husband to pay any sums necessary to enable the wife to carry on or defend the suit during its pendency, and it may decree costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered or in the power of the court, or in the hands of a receiver.”

<sup>2</sup> *Dixon v. Dixon*, 2 P. & M. 253; *Twistleton v. Twistleton*, 2 P. & M. 339. See same practice, *Green v. Green*, 40 How. Pr. 465; *Burgess v. Burgess*, 1 Duv. 288.

<sup>3</sup> *Reynolds v. Reynolds*, 67 Cal. 176; *Gregory v. Gregory*, 32 N. J. Eq. 424.

<sup>4</sup> *People v. Dist. Court* (Cal.), 40 P. 460; *Traylor v. Richardson*, 2 Ind. App. 452, 28 N. E. 205; *Weaver v. Weaver*, 33 Ga. 173.

<sup>5</sup> *Waters v. Waters*, 49 Mo. 385.

be awarded to him by the court, unless his case is without merit or probable cause. He is acting to a great extent as an officer of the court, and has an equitable right to an order in the proceeding compelling the husband to pay for his services. Neither party should have the assistance of the court in avoiding the payment of what is justly due the wife's attorney for his services. If the parties have settled their difficulties and dismissed the suit without paying the wife's attorney, he has the choice of two remedies: either to sue the husband in an action at law, or to have the divorce suit reinstated, and apply to the court for an order for the fees. The latter method is to be preferred; as it is an open question whether the husband is liable in an action at law. Even where the suit has been dismissed by stipulation of the parties or by the court, the attorneys for the wife may have such dismissal set aside, and an order entered for the payment of a certain sum to the wife as fees.<sup>1</sup> It is said that the power to enforce the attorney's rights after a settlement by the parties is founded upon the familiar principle of equity, that, where a court of equity has acquired jurisdiction over the parties and the subject-matter of the action, it will retain jurisdiction until complete justice is done to all parties.<sup>2</sup> In some instances it has been held that the attorneys are not entitled to an order for fees if the action was tried and the wife did not succeed; as this is an adjudication that the action should not have been brought.<sup>3</sup> With all respect to these authorities, it is submitted that if the attorney acted in good faith, and there was a probable cause

<sup>1</sup> *Courtney v. Courtney*, 4 Ind. App. 221; *Aspinwall v. Sabin*, 22 Neb. 73; *Davis v. Davis* (Ind.), 40 N. E. 802; *Thorndike v. Thorndike*, 1 Wash. Ter. 175; *Londen v. Londen*, 65 How. Pr. 411; *Moore v. Moore*, 10 Ontario Pr. Rep. 284; *Smith v. Smith*, 35 Hun, 378, affirmed, 99 N. Y. 639; *Lamy v. Catron* (N. Mex.), 23 P. 773

<sup>2</sup> *Chase v. Chase*, 65 How. Pr. 306, reversed for lack of proper notice, 29 Hun, 527.

<sup>3</sup> *Wagner v. Wagner*, 34 Minn. 441; *Newman v. Newman*, 69 Ill. 167; *McCulloch v. Murphy*, 45 Ill. 256; *Reynolds v. Reynolds*, 67 Cal. 176; *Thompson v. Thompson*, 40 Tenn. (3 Head), 526.

for divorce, he is entitled to compensation for his services, although no divorce was granted. It is sometimes held that the application for attorney's fees is too late after the settlement of the parties or a dismissal of the action; that such allowance is for the future; and as nothing further is to be done, there is no necessity for further expense.<sup>1</sup> But this is not a sufficient reason for permitting the husband to escape the payment of what is justly due for the services rendered, with the expectation that a suitable allowance would be made by the court.

As to the moral aspect of the case, it may be said that suits for divorce should be discouraged by denying attorney fees in every instance where the wife does not procure a decree. But a sound policy would seem to require the payment of what has in fact been earned in order that the husband should meet just obligations. Such a policy will have a wholesome effect in repressing future quarrels and difficulties, and teach the parties that they cannot appeal to the courts with petty cases without the expenditure of considerable sums.<sup>2</sup>

**§ 878. Number of counsel.**—The court should limit the number of counsel so that the amount allowed for their fees shall not be improper or oppressive. No particular number has been prescribed. The number of counsel necessary must be determined from the nature of the case, the usages of the court, and the number employed by the hus-

<sup>1</sup> *Beadleston v. Beadleston*, 9 Civil thereof in vacation may make Pro. 440; *Wilde v. Wilde*, 2 Nev. . . . such orders relative to the 306.

<sup>2</sup> A wife's suit for divorce was dismissed at her costs. In due time she applied to have the decree set aside and for an allowance for costs and attorney fees in addition to the allowance made before decree. The statute provided that "Pending a suit for divorce the court or the judge

band.<sup>1</sup> It has been held that four or five are too many,<sup>2</sup> or that one, or the members of one firm, will be enough under ordinary circumstances.<sup>3</sup> In a Wisconsin case the wife employed two able counsel; and when the husband employed the same number she employed a third counsel. The supreme court was of the opinion that any one of the three eminent counsel employed by the wife could have conducted the trial alone, and reduced the amount to about one fee, although the husband had ample means.<sup>4</sup> It would seem, however, that the wife should have as many counsel as the husband had found it necessary to employ for himself.<sup>5</sup> In the Sharon case the trial court permitted the employment of six lawyers to present the merits of the plaintiff's cause. The supreme court considered this "an undeserved reflection upon the administration of justice" in the trial court, and that such number was unreasonable and unnecessary.<sup>6</sup> The fact that one attorney is employed by the wife upon a contingent fee will be good ground for denying an allowance unless others are employed with him, when an allowance may be made.<sup>7</sup>

**§ 879. Amount of attorney's fees.**—The court may exercise its discretion in fixing the amount allowed as attorney's fees, keeping in view the nature of the case and the means of the husband as well as the nature and extent of the services to be required. The allowance, when made in advance of the trial, should be influenced by many considerations which affect the allowance for temporary alimony, of which it is a part. The amount should be conservative, as the cause may never reach trial, and if more labor be expended than was anticipated an additional allowance may be made after the trial. Generally the court determines

<sup>1</sup> See *Uhlman v. Uhlman*, 51 N. 520; *Burgess v. Burgess*, 1 Duv. Y. Supr. 361; *Money v. Money*, 1 (Ky.) 287.

<sup>2</sup> *Spinks*, 117.

<sup>4</sup> *Williams v. Williams*, 29 Wis. 517.

<sup>2</sup> *Rawson v. Rawson*, 37 Ill. Ap. 491; *Dugan v. Dugan*, 1 Duv. (Ky.) 289.

<sup>5</sup> See *Shy v. Shy*, 54 Tenn. 125; *Baldwin v. Baldwin*, 6 Gray, 341.

<sup>3</sup> *Whitney v. Whitney*, 7 Bush,

<sup>6</sup> *Sharon v. Sharon*, 75 Cal. 1.

<sup>7</sup> *White v. White*, 86 Cal. 212, 216.

what will be a reasonable fee in the case without hearing any evidence on that point.<sup>1</sup> No amount can be fixed as reasonable in all cases. The court must determine what is necessary for the protection of the rights of the wife. But little aid can be obtained from the reports, as all the facts are not stated; and yet it is believed that the matter in note below may be of some assistance.<sup>2</sup>

When an appeal is taken, the whole case is open for review upon the evidence, and while the courts hesitate to disturb discretionary orders, it seems that the order for at-

<sup>1</sup> *De Lamosas v. De Lamosas*, 62 N. Y. 618; *Peyre v. Peyre*, 79 Cal. 336. But see *contra*, *Whitney v. Whitney*, 7 Bush, 520; *Jeter v. Jeter*, 36 Ala. 391.

<sup>2</sup> The sum of \$100 is said to be a common fee for the trial of a suit for divorce. *Shy v. Shy*, 54 Tenn. (7 Heisk.) 125; *Lishey v. Lishey*, 2 Tenn. Ch. 1; *Vroom v. Marsh*, 29 N. J. Eq. 15; *Poutney v. Poutney*, 10 N. J. Supp. 192; *Umlauf v. Umlauf*, 128 Ill. 378; *Meathe v. Meathe*, 83 Mich. 150; *Harran v. Harran*, 85 Wis. 299, 55 N. W. 400.

In the following cases \$150 was allowed: *McConahey v. McConahey*, 21 Neb. 463; *Day v. Day*, 84 Ia. 221, 50 N. W. 979; *Bueter v. Bueter*, 1 S. Dak. 94, 45 N. W. 208; *Young v. Young* (Ky.), 15 S. W. 780; *Gordon v. Gordon*, 141 Ill. 160, 30 N. E. 446.

Sometimes \$200 is not considered excessive. *Doolittle v. Doolittle*, 78 Ia. 691; *Burgess v. Burgess*, 1 Duv. 287.

The following amounts have been allowed: \$250, *Douglas v. Douglas*, 81 Ia. 258; *Winton v. Winton*, 12 Ab. N. Cas. 159. \$290, *Ayers v. Ayers*, 41 Ill. Ap. 226. \$300 for trial and appeal, *Boyce v.*

*Boyce*, 27 N. J. Eq. 433; *Smith v. Smith*, 40 N. J. Eq. 602; *Ewing v. Ewing*, 4 A. 651; *Cowan v. Cowan*, 10 Colo. 540; *Friend v. Friend*, 53 Mich. 543. \$500 allowed in *Cane v. Cane*, 39 N. J. Eq. 148, for usual labor in defending the wife. See, also, *Pauly v. Pauly*, 69 Wis. 419; *Varney v. Varney*, 52 Wis. 120.

In *Walsh v. Walsh*, 61 Mich. 554, \$1,500 was allowed on appeal.

In *Meyar v. Meyar*, 3 Met. (Ky.) 298, \$25 was allowed for services in vacating a decree and conducting new trial.

In *Donnelly v. Donnelly*, 63 How. Pr. 481, \$95 was allowed for services on appeal.

In *Melvin v. Melvin*, 130 Pa. 6, \$100 was allowed on appeal.

Where the husband is a laborer, \$35 is a reasonable fee. *Davis v. Davis*, 36 Ill. Ap. 643.

Under the circumstances of the case, held that \$60 was not excessive. *Potts v. Potts*, 68 Mich. 492.

Where the suit involves the validity of three marriages and the laws of four different states, a fee of \$750 is not unreasonable where husband has an annual income of \$20,000. *Sinn v. Sinn*, 3 Misc. 598.

torney's fees is often changed with great freedom, and the amount reduced to what the appellate court deems a reasonable fee. Reasons for holding a fee excessive are seldom given; but the extent of the services rendered is often stated.<sup>1</sup>

**§ 880. The order for attorney's fees.**— While the wife's attorney is the real party in interest in obtaining the allowance, yet he is not a party to the suit; and the order must be that the amount be paid to the clerk of the court, or to the wife for the use of the attorney.<sup>2</sup> An order to pay a certain sum to an attorney is irregular.<sup>3</sup> The court cannot enter a direct judgment in favor of a person not a party to the suit.<sup>4</sup> The order should be entered separately,<sup>5</sup> and not included in the final decree.<sup>6</sup> An order to pay attorney fees to the attorney is not void but merely irregular.<sup>7</sup> On appeal the order will be corrected without a reversal.<sup>8</sup> The order for attorney fees is enforced like an order for temporary alimony. In some instances the court may deny any matter of favor until its order is complied with.<sup>9</sup> The court may refuse to dismiss the action until the attorneys are paid.<sup>10</sup> Where the husband refuses to comply with the order of the court, resort may be had to contempt proceedings, as if the order were for alimony alone.<sup>11</sup> Where the statute

<sup>1</sup> In *Williams v. Williams*, 29 Wis. 517, a fee of \$2,600 for three counsel was held excessive and reduced to \$600. *Blake v. Blake*, 70 Ill. 618, \$6,000 reduced to \$2,000. *Miller v. Miller*, 43 Ia. 325, \$700 reduced to \$200. *Raymond v. Raymond*, 13 Ill. Ap. 189, \$250 reduced to \$125.

<sup>2</sup> *Van Duzer v. Van Duzer*, 65 Ia. 625.

<sup>3</sup> *Sharon v. Sharon*, 75 Cal. 1.

<sup>4</sup> *Robinson v. Robinson*, 79 Cal. 511; *Parker v. Parker* (Miss.), 14 So. 459.

<sup>5</sup> See form of order in *Traylor v. Richardson*, 2 Ind. Ap. 452.

<sup>6</sup> *Williams v. Williams*, 6 N. Y.

Supp. 645; *Mercer v. Mercer*, 25 N. Y. Supp. 867; *Straus v. Straus*, 23 N. Y. Supp. 567.

<sup>7</sup> *People v. District Court* (Cal.), 40 P. 460.

<sup>8</sup> *Storke v. Storke*, 99 Cal. 621, 34 P. 339.

<sup>9</sup> *Farnham v. Farnham*, 9 How. Pr. 231.

<sup>10</sup> *Courtney v. Courtney*, 4 Ind. Ap. 221; *Cooper v. Cooper*, 3 Swab. & T. 392; *Dixon v. Dixon*, 2 P. & M. 253.

<sup>11</sup> See *Ballard v. Caperton*, 2 Met. 412; *Pritchard v. Pritchard*, 4 Abb. N. Cas. 298; *Branth v. Branth*, 20 Civil Pro. 33.

authorizes an execution to issue, other remedies are not excluded. Such statute does not deprive a court of its inherent power to punish for contempt.<sup>1</sup>

**§ 881. Contingent fee.**—An agreement with the wife that her attorneys shall receive a portion of the amount of alimony obtained is champertous and void as against public policy. Agreements for contingent fees are objectionable in ordinary actions, but in actions for divorce this kind of agreement is particularly vicious. The wife's attorney becomes an interested party in the proceeding, and ceases to act in the capacity of a legal adviser and an officer of the court. His concern is to ignore any rights of his client which interfere with the decree for alimony, and, if he follows his own interest, he encourages divorce and discourages all attempts at reconciliation. It is also a fraud upon the court to obtain the allowance for the wife's support and divert the fund for other purposes, especially where the court makes a reasonable allowance for attorney fees. The courts discourage such agreements; and if, in the progress of the trial, the court discovers that an attorney has rendered his services upon a contingent fee, no allowance for attorney's fees will be made.<sup>2</sup> If the wife has other attorneys who are not parties to the champertous agreement, an allowance will be made for their services.<sup>3</sup> Although the wife has assigned a portion of the alimony to her attorneys as their fees, she may recover any portion of her alimony held by them under such agreement.<sup>4</sup>

**§ 882. Attorney's lien.**—The allowance made by the court for the maintenance of the wife is ordinarily exempt from all liens and claims of creditors, on the ground that public policy requires that the divorced wife shall not be left destitute to become dependent upon the state for sup-

<sup>1</sup> *People v. Dist. Court* (Cal.), 40 P. 460. 170. See in this case form of contract held champertous, and also

<sup>2</sup> *Sharon v. Sharon*, 75 Cal. 1.

remarks of the court concerning reprehensible conduct of attorneys

<sup>3</sup> *White v. White*, 86 Cal. 212.

in preventing reconciliation.

<sup>4</sup> *Jordan v. Westerman*, 62 Mich.

port. A court of equity will not allow this fund to be diverted to any other purpose except her support. It follows, therefore, that her assignment of a portion of the alimony awarded her is void and will not be enforced.<sup>1</sup> And an attorney is not entitled to a lien upon payments of alimony in his hands, as this would defeat the purpose of the allowance. There are, however, some circumstances in which a lien for services and costs advanced will be permitted by the court granting the alimony. If the allowance provides for a certain sum for attorney's fees, the attorney would have a lien for that amount, but not for a greater sum. And it seems that her attorneys may have a lien where alimony is allowed in gross, but the court has the power to determine what is a reasonable fee in such case.<sup>2</sup> An attorney's lien for fees and costs advanced was sustained in an English case where arrears of temporary alimony were paid upon an order of the court entered when the husband dismissed the action. The wife claimed the fund as exempt for her separate maintenance; but the court was of the opinion that as the wife had authorized the payment of the alimony to her attorney, he had a lien upon the same as in other cases between attorney and client.<sup>3</sup> Under the circumstances the court had the power to apply the alimony to the payment of attorney's fees; as the marriage was not dissolved, and the husband was still liable for her maintenance.

<sup>1</sup> *Jordan v. Westerman*, 62 Mich. 170.      <sup>2</sup> *Brenner, Ex parte*, 1 P. & M. 254.

<sup>2</sup> *State v. Sachs*, 3 Wash. St. 371.

## PERMANENT ALIMONY.

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| <p>§ 900. In general.</p> <p>901. Permanent alimony of the common law.</p> <p>902. Permanent alimony on decree of separation.</p> <p>903. Distinction between common-law and statutory alimony.</p> <p>904. Liability of wife to pay the husband alimony.</p> <p>905. When alimony is refused.</p> <p>905a. Annulment of marriage.</p> <p>906. Alimony where a divorce is denied.</p> <p>907. When a guilty wife may receive alimony.</p> <p>908. The amount of the permanent allowance.</p> | <p>§ 909. Compensation for the wife's property rights.</p> <p>910. Compensation for injuries.</p> <p>911. Compensation for loss of support.</p> <p>912. The husband's income and property.</p> <p>913. The wife's income and property.</p> <p>914. The support of the children.</p> <p>915. Agreements relating to alimony.</p> <p>916. Other circumstances which determine the amount.</p> <p>917. Allowance where the husband has no property.</p> <p>918. Pleading and practice.</p> |
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**§ 900. In general.**—It is the duty of the husband to support the wife according to his ability and in a manner suitable to his fortune and condition. If a judicial separation or an absolute divorce is rendered for the fault of the husband, he is not relieved from this liability for support. After divorce this liability is continued in the form of a decree for a certain sum of money payable to the wife. For the wife, if compelled by his misconduct to seek the aid of the court, does not forfeit her property rights. This allowance to the wife upon a decree of divorce from bed and board was at common law called permanent alimony. We have no special term in this country for the allowance made to the wife after a decree of divorce dissolving the bonds of matrimony. Such allowance is generally called "permanent alimony;" but this term does not distinguish between the two kinds of

decrees of divorce, partial and absolute. In England the allowance made for the wife upon an absolute divorce is called a "permanent maintenance," and the term "permanent alimony" retains its common-law meaning. The decree providing for the support of the wife, after an absolute divorce, is called a "permanent allowance" in California, and perhaps this statutory term is used in other states.<sup>1</sup>

Our courts have so often found it necessary to distinguish between the permanent alimony of the common law and the permanent allowance of the statutes, that it would seem best to make the distinction in every instance to avoid misapprehension. In this work the word *alimony* is used to denote any allowance by the court for the support of the wife after a decree of divorce, either *a mensa* or *a vinculo*, and such is the meaning of the word as commonly used.<sup>2</sup> The power to grant the wife a permanent allowance after an absolute divorce is not derived from the common law and is not derived from the jurisdiction to grant divorce. The permanent alimony of the common law was granted to the wife upon a decree of separation from bed and board; so that it is held that our statutes must confer upon our courts the power to grant the wife a permanent allowance after the dissolution of the bonds of matrimony.<sup>3</sup> The statute

<sup>1</sup> *In re Spencer*, 83 Cal. 460, 23 P. 395. See sec. 139, Cal. Civil Code.

<sup>2</sup> "Alimony is the allowance which is made to a woman, on a decree of divorce, for her support out of the estate of her husband. . . . It is the equivalent of the obligation of the husband to furnish his wife a suitable support—corresponding in degree with his pecuniary ability and social standing." *Stillman v. Stillman*, 99 Ill. 196; *Adams v. Storey*, 135 Ill. 448, 26 N. E. 582. In New York alimony is said to be "like the *alimentum* of the civil law, from which the word was evidently derived, . . . a provision for food,

clothing and a habitation, or the necessary support of the wife after the marriage bond has been severed; and since what is thus necessary has more or less of relation to the condition, habit of life, and social position of the individual, it is graded in the judgment of a court of equity somewhat by regard for these circumstances, but never loses its distinctive character." *Romaine v. Chauncey*, 129 N. Y. 566, affirming 60 Hun, 477; s. c., 15 N. Y. Sup. 198.

<sup>3</sup> *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Romaine v. Chauncey*, 129 N. Y. 566.

must confer the power upon the court to provide some allowance for the wife, who is, by an absolute divorce, placed in a situation unknown at the common law.<sup>1</sup>

**§ 901. Permanent alimony of the common law.**— This form of alimony requires separate treatment, owing to the distinct purpose for which it was allowed and the limited powers of the courts which granted it. At present jurisdiction of divorce is generally conferred on courts of equity having all the powers incident to equity jurisdiction; and such courts may exercise such powers, in a settlement after a dissolution of the marriage, to restore to the wife her separate estate, divide personal and real property, decree a gross sum of money, and secure the same by making the decree a lien upon the husband's real estate. But the ecclesiastical courts did not possess any of these powers for rendering exact justice between husband and wife. The most rigorous decree which it ventured to give in the most extreme case was one-half the joint income of the parties, even where it was shown that the entire estate came through the wife. The inadequacy of such relief is illustrated by a decision of the arches court of Canterbury in 1812. "In this instance," said Sir John Nicholl, "the husband raised himself to independence and affluence by marrying this young woman; he has not only injured, but insulted, her by debauching a maid-servant who lived at the adjoining house; for this servant he has taken a house, and for her society he has abandoned the society of his wife; he has children by her, and receives his friends in the house, and introduces her to them as his wife. It is a most offensive case. If he violates the marriage contract, it might be equitable, perhaps, that he should lose the whole benefit of it, and be obliged to give up the whole of the wife's property.

<sup>1</sup> This principle is overlooked in *Chaires v. Chaires*, 10 Fla. 308, divorce, § 751.

where the court appears to have made no distinction between temporary and permanent alimony. Whether applied for on separate petition, see § 747.

For form of application for permanent alimony, see § 766.

At all events it would be most unjust that the wife should be deprived of any considerable portion of the property she brought, in order to support the husband in public scandal, and to enable him to continue his adulterous connection and provide for the issue which are the fruits of it.”<sup>1</sup> The limitations which surrounded the ecclesiastical courts in their care of souls, the crude and unjust laws relating to married women and their property rights, as well as the fact that only a partial divorce was granted, render the decisions of such courts of very little value in determining the amount of permanent allowance to the wife where the marriage has been dissolved. But a review of the decisions may be made here in justification of what has been said.<sup>2</sup>

<sup>1</sup> *Cooke v. Cooke*, 2 *Phillim.* 40. The court then affirmed a decree allowing the wife £450 per annum—about one-half of the husband’s income—leaving the remainder to him to be enjoyed with his concubine and her children. This case is often cited as a precedent in determining the amount of alimony; but for obvious reasons it has no application in modern practice. According to modern views of justice, the circumstances of this case would require that the innocent party should not suffer by a marriage the obligations of which the other has broken; and our courts would dissolve the marriage, restore the property to the wife, and leave the husband to make the best of the situation by marrying the concubine and caring for his children. It is submitted, also, that a dissolution of the marriage in such a case is in accordance with sound public policy.

<sup>2</sup> Where the husband’s income was between two and three thousand pounds, and the wife’s prop-

erty at marriage was only 6,000*l.*, the court allowed her 200*l.* per annum, payable quarterly, and the sum of 400*l.* for two years arrears of alimony, she having received no alimony during suit. *Robinson v. Robinson*, 2 *Lee*, 593 (1728).

The sum of 160*l.* per annum was allowed to the wife, that being about two-fifths of the husband’s income. No reduction was made in favor of the husband because he paid 200*l.* to the support of a daughter. *Street v. Street*, 2 *Ad. Ec.* 1.

Where the joint incomes amounted to 5,500*l.* per annum and the husband had six children to maintain and educate, the wife was allowed 2,000*l.* per annum, payable quarterly, although the greater part of the property came from the wife. *Otway v. Otway*, 2 *Phillim.* 109.

Where the property was settled upon the wife and she was induced, by the hope of better treatment, to give it up to her husband, she was allowed 1,000*l.* per annum, one-half the joint income, for herself and

**§ 902. Permanent alimony on decree of separation.—** The allowance made on a decree of separation is in many respects the same as the permanent alimony awarded by the ecclesiastical courts on a decree *a mensa et thoro*. The decrees are almost identical, and the subsequent *status* of the parties is the same. The wife does not lose her dower interest by either decree, and the husband retains the right of courtesy. She is still entitled to her distributive share in his personal property, should he die intestate. The parties are still husband and wife. The circumstances of the parties, and their legal rights, being the same as upon a decree *a mensa et thoro*, it follows that the principles of the permanent alimony of the ecclesiastical law should govern the award of permanent alimony after a decree of separation. In the absence of any statutory provision to the contrary, the allowance is a suitable provision for the wife from the income of her husband, and not a portion of his estate or a gross sum.<sup>1</sup> It is not a division or restoration of property.<sup>2</sup> The amount is modified by the wife's demeanor and the extent of the husband's *delictum*, the respective needs and incomes of the parties, and other considerations which may influence judicial discretion.<sup>3</sup> An allowance may be made for the support of the wife on a decree *nisi*.<sup>4</sup> As such allow-

child. *Smith v. Smith*, 2 Phillim. 235.

<sup>2</sup> *Doe v. Doe*, 52 Hun, 405; s. c., 5 N. Y. Supp. 514. But see *Holmes v. Holmes*, 4 Barb. 295.

The sum of 100*l.* was allowed the wife where she had a separate income of 350*l.*, and the husband's income was about 1,015*l.*, out of which he supported seven children. *Rees v. Rees*, 3 Phillim. 387.

<sup>3</sup> See on these points, *Burr v. Burr*, 10 Paige, 20; *Sleeper v. Sleeper*, 65 Hun, 454, 20 N. Y. Supp. 339; *Williams v. Williams*, 6 N. Y. Supp. 645; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Cullen v. Cullen*, 55 J. & S. 346; *Emerson v. Emerson*, 68 Hun, 37; s. c., 22 N. Y. Supp. 684.

See, also, amount of permanent alimony granted in *Blaguiere v. Blaguiere*, 3 Phillim. 258; *Durant v. Durant*, 1 Hag. 528; *Kempe v. Kempe*, 1 Hag. 532; *Mytton v. Mytton*, 3 Hag. Ec. 657.

<sup>4</sup> *Waterhouse v. Waterhouse*, 6 Rep. (1894), 630.

<sup>1</sup> *Burr v. Burr*, 10 Paige, 7 Hill, 207.

ance is not permanent, and as the marriage is not dissolved, this form of alimony resembles the common-law alimony and is governed by the same principles. Such decree is subject to revision at any time during the separation, and the amount may be increased or diminished according to the changed circumstances of the parties.<sup>1</sup> The object of such revision is to preserve the equality of their respective incomes.<sup>2</sup> If after the decree of separation the wife acquires an adequate income from other sources, the decree for alimony may be vacated on the application of the husband.<sup>3</sup> In general it may be said that this kind of alimony terminates whenever the necessity for it ceases, as when the parties become reconciled and renew cohabitation.<sup>4</sup> A decree of absolute divorce, if rendered after a decree *a mensa*, terminates the permanent alimony allowed on the latter decree.<sup>5</sup> The permanent alimony on a decree of separation terminates on the death of either party.<sup>6</sup> On the death of the wife the husband is under no legal obligation to her heirs, as the decree was for maintenance of the wife, and was not a vested right. On the death of the husband the wife comes into possession of her distributive share as a widow, and there is no necessity for continuing the alimony.<sup>7</sup> This form of alimony is for the support of the wife during the separation. It must be distinguished from the permanent allowance to the wife on a dissolution of the marriage, as such allowance is more in the nature of a final settlement of partnership accounts.

<sup>1</sup> Halsted *v.* Halsted, 5 Duer, 659; Strauss *v.* Strauss, 14 N. Y. Supp. 671; Simonds *v.* Simonds, 10 N. Y. Supp. 606; Stahl *v.* Stahl, 12 N. Y. Supp. 855; Kerr *v.* Kerr, 9 Daly, 517.

<sup>2</sup> Mildeberger *v.* Mildeberger, 12 Daly, 195.

<sup>3</sup> Holmes *v.* Holmes, 4 Barb. 295; Whispell *v.* Whispell, 4 Barb. 217.

<sup>4</sup> Nicol *v.* Nicol, 30 Ch. D. 143, 31 Ch. Div. 524.

<sup>5</sup> Blake *v.* Cooper, 7 S. & R. 500; Smith *v.* Smith, 3 S. & R. 248. But see Bremner *v.* Bremner, 48 Ind.

<sup>6</sup> 262.

<sup>7</sup> Dewees *v.* Dewees, 55 Miss. 315.

<sup>7</sup> Lockridge *v.* Lockridge, 3 Dana (Ky.), 28; Storey *v.* Storey, 125 Ill. 608, 18 N. E. 329; Clark *v.* Clark, 6 Watts & S. 85; Stones *v.* Cooke, 8 Sim. 321; Shaftoe *v.* Shaftoe, 7 Ves. 171; Dawson *v.* Dawson, 7 Ves. 173.

**§ 903. Distinction between common-law and statutory alimony.**—Mr. Bishop claims that the rules governing permanent alimony at common law are applicable to the statutory alimony; and in the chapter on "Permanent alimony" has drawn largely from the ecclesiastical reports, blending and confusing the alimony of the common law, and the statutory allowance made by our courts on dissolving the marriage. "We have American authority," said he, "that a judicial discretion conferred by statute to grant alimony on a decree dissolving the marriage should be exercised by the court on the same principles as the like discretion where the divorce is from bed and board."<sup>1</sup> The English courts, since the divorce act, may grant an absolute divorce; and where such divorce was rendered, the divorce court was of the opinion that the wife should receive the same amount which the ecclesiastical courts would have granted. "If a man, before the divorce act, treated his wife with cruelty and was also guilty of adultery, she could only obtain a divorce *a mensa et thoro*; and an allowance called permanent alimony was made her, which was generally calculated at the rate of one-third of her husband's income. Since the divorce act, the same conduct on the part of the husband entitles the wife to a dissolution of her marriage; but it is hard to say that she was intended by the legislature to purchase that remedy by a surrender to any extent of the provision to which she would otherwise have been entitled. The needs of the wife and the wrong of the husband are the same in both cases. In both cases the husband has of his own wrong and wickedness thrust forth his wife from the position of participator in his station and means. Obliged in both cases to withdraw from his home, she is, without any fault of her own, deprived of her fair and reasonable share of such necessaries and comforts as lay at his command. Why should not the husband's purse be called upon to meet both cases alike?"<sup>2</sup> This case is said by Mr. Bishop

<sup>1</sup> Citing *Harris v. Harris*, 31 Grat. <sup>2</sup> *Sidney v. Sidney*, 4 Swab. & T. 13; *Blake v. Blake*, 68 Wis. 303. 178.

to have settled the doctrine in England as to alimony on dissolution.<sup>1</sup>

But it is submitted that decisions of the ecclesiastical courts are entitled to small value as precedents for the following reasons: Equity requires that where the wife obtains divorce she shall not suffer pecuniarily on account of the dissolution of the marriage for the husband's ill conduct. To place her *in statu quo* requires the court to consider a condition of facts and property rights that could not exist at common law, and cannot be adjusted by common-law principles. The wife has now both separate property and separate income. Her right of dower upon divorce is declared by statute in some states, and in others the court must allow her a sum to compensate the loss of dower. The power of the court to restore in fee the property of the wife, and the ability of the wife to receive and control it in her own right, are also novel to the common law. Common-law alimony was granted to the wife for her separate maintenance until the parties become reconciled, while the statutory allowance is in fact a final distribution of the property in order that the parties may be forever independent of each other. The principles of this final distribution are in some respects different from the principles which govern the allowance of the common-law alimony. The ecclesiastical courts ascertained the husband's income and awarded her a portion of it as maintenance. The modern courts ascertain the value of the husband's property and give the wife an equitable portion of it, or a gross sum in lieu of all her rights, or a sum payable in instalments, which is granted in lieu of maintenance and her right of dower.<sup>2</sup>

<sup>1</sup> Approved in *Campbell v. Campbell*, 90 Ga. 687.

<sup>2</sup> In *Calame v. Calame*, 24 N. J. Eq. 440, the court refused to follow the ecclesiastical practice in granting alimony, either as to amount or the terms of the decree, as well as the object to be attained in

granting the allowance. The reasons assigned were as follows: "In the ecclesiastical law, as it existed in England prior to the statute of 1858, no divorces from the matrimonial bond were decreed by the courts. All divorces so decreed were only from bed and board, and

The true doctrine of the law of permanent allowance after a total divorce is that such decree is a final adjudication of the property rights of both parties. This may be a new doctrine to those who have considered the allowance to be the same as the permanent alimony of the common law. But this is clearly the doctrine of all modern authorities which distinguish between the two kinds of alimony. The court in making the allowance must estimate the property of both parties, and adjudicate all claims which one party has against the other. The court, sitting as a court of equity, and having the parties before it, will not render a decree disposing of part of the questions before it, leaving the parties to resort to further litigation; but under its equity jurisdiction will proceed to decide all the issues which arise in the case, and will award complete relief.<sup>1</sup> The decree for alimony is in many respects like the decree rendered in the final settlement of partnership accounts. Both are presumed to adjudicate all matters which might have been litigated. The best-considered authorities clearly concur in holding that the permanent allowance after total divorce is a final determination of all property rights growing out of the marriage relation, or otherwise existing between the parties at the time of divorce.<sup>2</sup> It is this consideration that

whatever provision was made by the courts for the wife while the separation continued was made with reference to a probable or possible reconciliation, and was not meant to discourage it. Hence alimony, as a general term, if not restricted in meaning to stated allotments of income, was yet a provision which, in point of fact, was made in that class of cases by payments from time to time, and not at once and in full of all future demands. It could not well be, and certainly did not need to be, the latter. But where the divorce, as

under our law, is unqualified and absolute, and the wife is no longer the wife, and no longer holds her dower or other interest in the property of the husband, to be asserted in his life or at his death, *the nature and principles of the provision to be made for her rights by the courts are essentially and radically different.*"

<sup>1</sup> Pomeroy's Equity Jur., § 231.

<sup>2</sup> Parker v. Albee, 86 Ia. 46, 52 N. W. 533; Patton v. Laughridge, 49 Ia. 218; Tatro v. Tatro, 18 Neb. 395, 25 N. W. 571; Behrley v. Behrley, 93 Ind. 255, and cases cited; Mucken-

controls the amount of the permanent allowance in cases where both parties have property rights. As a decree in final settlement it makes the wife a creditor of the husband, and it is not therefore subject to revision and does not terminate on the death of either party.<sup>1</sup>

**§ 904. Liability of wife to pay the husband alimony.**—No instance could occur at common law in which the court would decree alimony to the husband; and, in the absence of any statute creating such liability, the wife would not be liable to an action for alimony, although she is enabled by statute to hold and transfer real and personal property in her own name and right.<sup>2</sup> But under modern legislation the wife may have all the property transferred to her by the husband, and it would be inequitable that, when a divorce is granted for her fault, she should retain the property. To do exact justice in the premises, the court may make such decree respecting an allowance to the husband as will place him in as good a situation as if the marriage was not dissolved. In some states it is provided that alimony may be decreed to either party.<sup>3</sup> And in proper circumstances alimony may be decreed to the husband although he is the guilty party.<sup>4</sup> Where a division of the property is made in the decree, it may be convenient to allow the wife to retain the real estate, and to pay the husband in easy instalments the value of his interest in the property.<sup>5</sup> The English courts are authorized by statute to exercise a very liberal discretion in adjusting the property of both parties when the marriage is dissolved, and may increase the husband's

burg *v.* Holler, 29 Ind. 139; Thompson *v.* Thompson, 123 Ind. 288, 31

N. E. 529; Gray *v.* Thomas, 83 Tex. 246, 18 S. W. 721; Johnson *v.* Johnson, 65 How. Pr. 517; Meldrum *v.*

Meldrum, 15 Colo. 478, 24 P. 1088; Roe *v.* Roe, 52 Kan. 724, 35 P. 808.

<sup>1</sup> §§ 932, 933, 933a, 934, 935. See 494.

also on this point, Smith *v.* Smith, 45 Ala. 264, quoted in § 933a.

<sup>2</sup> Somers *v.* Somers, 39 Kan. 132, 17 P. 841.

<sup>3</sup> Garnett *v.* Garnett, 114 Mass. 347; Abel *v.* Abel (Ia.), 56 N. W. 442.

<sup>4</sup> Barnes *v.* Barnes, 59 Ia. 456.

<sup>5</sup> Snodgrass *v.* Snodgrass, 40 Kan.

allowance under a marriage settlement or grant him an allowance from the wife's income.<sup>1</sup>

Under a statute which provides that "the court, on decreeing a divorce, shall make provision for the guardianship, custody and support of the minor children of such marriage," a decree may be entered providing that the wife shall pay to the husband one-third of the rents and profits for the support and education of the children.<sup>2</sup> In Oregon the husband is entitled to one-third of the wife's real property after a divorce for her fault, under a statute allowing that proportion to the party obtaining the decree.<sup>3</sup>

**§ 905. When alimony is refused.**—Alimony is refused whenever from the circumstances of the case there is no reason or necessity for allowing it. Where the husband has no income or property, and is unable to work, no allowance will be made. Nor is the wife entitled to anything where the husband's resources are all required to support the children. No necessity appears where the wife has sufficient separate property of her own to support her as if the marriage had continued, or where sufficient property has been conveyed to her by the husband.<sup>4</sup> A valid marriage settlement or ante-nuptial contract may obviate the necessity for alimony where the terms are fair and the provision for the wife is adequate.<sup>5</sup> These contracts are perhaps valid so far as they affect the wife's property rights, but do not relieve

<sup>1</sup> *Swift v. Swift*, 15 P. D. 118; *false pretenses*. *Munroe v. Munroe*, 20 Or. 579, 26 P. 838.

*March v. March*, 1 P. & M. 440.

<sup>4</sup> *Harrison v. Harrison*, 49 Mich.

<sup>2</sup> *Cheever v. Wilson*, 76 U. S. 108.

<sup>3</sup> *Rees v. Rees*, 7 Or. 48. It is difficult to see the object of depriving the court of the power to make an equitable division of the property in such cases. Under such statute the husband may recover money advanced to the wife before marriage, where it is shown that the marriage and a release of all claim for the money was obtained by

<sup>5</sup> *Rose v. Rose*, 11 Paige, 166; *Stevens v. Stevens*, 49 Mich. 504; *Stultz v. Stultz*, 107 Ind. 400.

<sup>5</sup> *Galusha v. Galusha*, 116 N. Y. 635, reversing 43 Hun, 181. See ante-nuptial contract held a bar. *Corey v. Corey*, 81 Ind. 469. See *contra*, *Wilson v. Wilson*, 40 Ia. 230; *Miller v. Miller*, 1 N. J. Eq. 386.

the husband from the obligation of support.<sup>1</sup> If not sufficient an additional amount may be awarded.<sup>2</sup> And the court may in its discretion consider the nature of the husband's offense, and award something in addition as a compensation for her damage.<sup>3</sup> Agreements to pay the wife a certain sum during separation will not constitute a bar to the allowance; but if the sum is adequate it may be ratified by the court. It will not be ratified if the rights of the wife are not fully protected and the payments properly secured.<sup>4</sup> Alimony must be refused when a divorce is denied, unless there is some statute to the contrary. If the husband obtains a divorce from his wife he is not liable for her continued support in the form of alimony. In some circumstances, however, the court will make some allowance for a guilty wife.<sup>5</sup>

**§ 905a. Annulment of marriage.**—No permanent alimony can be granted on a decree of nullity, as such decree is a finding that no valid marriage ever existed.<sup>6</sup> Where the statute does not confer the power to award permanent alimony on a decree of nullity, the court has the power as a court of equity to restore to the parties the property

<sup>1</sup> *Logan v. Logan*, 2 B. Mon. 142—149.

<sup>2</sup> *Benyon v. Benyon*, 1 P. D. 447.

<sup>3</sup> *Stearns v. Stearns* (Vt.), 28 A. 875. After a decree of divorce and alimony has been rendered, and the court has reserved the power to modify the decree, the wife may obtain an order annulling the agreement and an allowance as if such agreement had not existed. Amounts paid by the husband on said agreement are for her support and need not be restored by the wife. *Galusha v. Galusha*, 138 N. Y. 272.

<sup>4</sup> *Evans v. Evans* (Ky.), 20 S. W. 605.

<sup>5</sup> § 907.

<sup>6</sup> *Fuller v. Fuller*, 33 Kan. 582; *Wilhite v. Wilhite*, 41 Kan. 154.

*Stewart v. Vandervort*, 34 W. Va. 524. This was an action to annul a marriage because the wife had a former husband living. The wife applied for permanent alimony and proved that she had married in good faith, having good reason to believe that her husband was dead; that the parties had lived together for twenty years and had acquired property by their joint labor and economy. It was held that in the absence of a statute in force when the void marriage was contracted the court had no power to award permanent alimony.

owned by each prior to the marriage.<sup>1</sup> In some states the statutes provide that alimony may be granted as in other cases.<sup>2</sup> The object of these statutes is not to permit the court to grant the regular permanent alimony for the support of the wife and in compensation for her right of dower, but some just and reasonable amount in restitution of the property received by the husband by reason of the marriage and compensation for the services of the wife.

**§ 906. Alimony where a divorce is denied.**—It seems that where neither party is guilty of a cause for divorce, and a decree is denied, the court cannot enter a decree for alimony. If the husband has not been guilty of a cause for divorce he is not liable for the separate maintenance of the wife. It is her duty to return to his house.<sup>3</sup> If she is not guilty of conduct which is a cause for divorce it is his duty to receive her. Where it is provided that, where the husband is guilty of certain causes for divorce, the court may enter a decree of separation or "such other decree in the

<sup>1</sup> *A. v. M.*, 10 P. D. 178. See other remedies, such as recovery of damages, rents and profits, etc., in § 1023. A court of equity will enjoin the enforcement of a decree for alimony where it is shown that the marriage is void. *Scurlock v. Scurlock*, 92 Tenn. 629, 23 S. W. 858.

<sup>2</sup> *Van Valley v. Van Valley*, 19 O. St. 588. Section 3427, McClain's Annotated Code of Iowa, provides that, "In case either party entered into the contract of marriage in good faith, supposing the other to be capable of contracting, and the marriage is declared a nullity, such fact shall be entered in the decree, and the court may decree such innocent party compensation as in cases of divorce." *Barber v. Barber*, 74 Ia. 301; *Daniels v. Morris*, 54 Ia. 369. The Wisconsin statute provides that, "Upon rendering

a judgment annulling a marriage, the court may make provision for restoring to the wife the whole or any such part as it shall deem just and reasonable, of any estate which the husband may have received from her, or the value thereof, and may compel him to disclose what estate he shall have received and when and how the same has been disposed of." *Wheeler v. Wheeler*, 76 Wis. 631. Under this statute the court may compel the husband to return to the wife the amount he received from her with interest thereon; and where the husband and wife have been partners, the husband is liable to the wife for one-half of the net profits of the business with interest. *Wheeler v. Wheeler*, 79 Wis. 303.

<sup>3</sup> *McCahill v. McCahill*, 71 Hun, 224, 25 N. Y. Supp. 221.

premises as the nature and circumstances of the case require," the court may refuse a decree of divorce and allow alimony.<sup>1</sup> There are statutes in several states providing that although a divorce is refused the court may make such order concerning the support and maintenance of the wife and of her children as may be necessary. The circumstances under which such a decree will be made must be of the same nature as would justify a decree of divorce.<sup>2</sup> Where the parties are in mutual fault as to the conduct complained of, the courts will generally refuse alimony or a division of the property unless the statute permits such relief.<sup>3</sup>

**§ 907. When a guilty wife may receive alimony.**—According to the ecclesiastical practice the guilty wife received no alimony, although there may have been some mitigating circumstances in her favor, and she might have brought a considerable dowry to her husband.<sup>4</sup> Her offense relieved her husband from all duty of support. But the severity of this rule soon became manifest, and it was customary to make some provision for the wife when a divorce was granted by parliament to the husband.<sup>5</sup> The divorce court now has discretionary power to grant her alimony, but will ordinarily refuse to do so.<sup>6</sup> In New York, Missouri and California the court is prevented from exercising any discretion in the matter by the provision of the statute that alimony may be allowed where a divorce is granted for the offense of the husband.<sup>7</sup>

<sup>1</sup> Nicely *v.* Nicely, 40 Tenn. 184.

<sup>3</sup> Van Brunt *v.* Van Brunt, 52

<sup>2</sup> Ruckman *v.* Ruckman, 58 How.

Kan. 380, 34 P. 1117.

Pr. 278; Douglas *v.* Douglas, 5 Hun, 140; *P. v. P.*, 24 How. Pr. 197; Davis *v.* Davis, 1 Hun, 444; Atwater *v.* Atwater, 53 Barb. 621; Chaffee *v.* Chaffee, 15 Mich. 184; Tilton *v.* Tilton (Ky.), 29 S. W. 290. See, also, sec. 136 of California Code, as interpreted in Hagle *v.* Hagle, 68 Cal. 588; Hagle *v.* Hagle, 74 Cal. 608; Peyre *v.* Peyre, 79 Cal. 336.

<sup>4</sup> 3 Blackstone's Com. 94; Perry *v.* Perry, 2 Barb. Ch. 311; Allen *v.* Allen, 43 Conn. 419; Palmer *v.* Palmer, 1 Paige, 276.

<sup>5</sup> 3 Law Rep. 219.

<sup>6</sup> Ratcliff *v.* Ratcliff, 1 Swab. & T. 467.

<sup>7</sup> Waring *v.* Waring, 100 N. Y. 570; McIntire *v.* McIntire, 80 Mo. 470; Everett *v.* Everett, 52 Cal. 383; Doyle *v.* Doyle, 26 Mo. 545.

The Kentucky statute provides that, "if the wife have not sufficient estate of her own, she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable." A literal construction of this statute would be that, because the divorce was not obtained by the wife in a proceeding by her for that purpose, she is not entitled to alimony. But it is held where a divorce is granted to the husband on account of separation for five years, and he is in fault, having left the wife, the decree of divorce will not be disturbed, but the wife will be allowed alimony.<sup>1</sup> The statute is construed to embrace any case where the wife is entitled to obtain a divorce, though the husband is seeking it;<sup>2</sup> or where she is guilty of desertion, but is otherwise innocent or not greatly at fault.<sup>3</sup>

In most of the states the provisions of the statute relating to alimony confer an unlimited discretion upon the court to allow alimony according to the conduct of the parties and the circumstances of the case.<sup>4</sup> The common-law doctrine was held to be modified by the general terms of a statute which provided as follows: "When a divorce shall be decreed, the court may make *such order* touching the alimony and maintenance of the wife, the care, custody and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable

<sup>1</sup> *Lacey v. Lacey* (Ky.), 23 S. W. Ill. 74; *Reavis v. Reavis*, 1 Scam. 673.

<sup>2</sup> *Davis v. Davis*, 86 Ky. 32, 4 S. W. 822.

<sup>3</sup> *Hoover v. Hoover* (Ky.), 21 S. W. 234.

<sup>4</sup> See statutory provisions in the following cases: *Lovett v. Lovett*, 11 Ala. 763; *Luthe v. Luthe*, 12 Colo. 421; *Chandler v. Chandler*, 13 Ind. 492; *Conner v. Conner*, 29 Ind. 48; *Hedrick v. Hedrick*, 28 Ind. 291; *Cox v. Cox*, 25 Ind. 303; *Coon v. Coon*, 26 Ind. 189; *Hyatt v. Hyatt*, 33 Ind. 309; *Deenis v. Deenis*, 79

Ill. 74; *Reavis v. Reavis*, 1 Scam. (Ill.) 242; *Fivecoat v. Fivecoat*, 32 Ia. 198; *Zuver v. Zuver*, 36 Ia. 190; *Pence v. Pence*, 6 B. Mon. 496; *Gains v. Gains* (Ky.), 19 S. W. 929; *Brandon v. Brandon*, 14 Kan. 342; *Graves v. Graves*, 108 Mass. 314; *Sheafe v. Sheafe*, 4 Fost. (N. H.) 564; *Sheafe v. Laighton*, 36 N. H. 240; *Janvrin v. Janvrin*, 59 N. H. 23; *Dailey v. Dailey, Wright*, 514; *Aldrich v. Aldrich*, 21 Ontario Sup. 447; *Buckminster v. Buckminster*, 38 Vt. 248. In Nebraska and Wisconsin alimony may be granted a

and just."<sup>1</sup> The reasons why alimony is sometimes allowed to a guilty wife are: To provide for the support of children, if the custody of any are awarded her; to permit the court to make a partial restoration of the property which she brought to her husband at marriage, or any subsequent contributions she may have made; to provide for her to some extent so that she will not become a public charge or be forced into prostitution, and to permit the court to make some allowance where there are some mitigating circumstances, in order that justice may be tempered with mercy.

But it is error to allow alimony to a wife where there are no mitigating circumstances. Thus, where a husband obtained a divorce from his wife for desertion, it was held that the wife was not entitled to any allowance where she brought no means with her, and without any excuse had deliberately abandoned her husband and lived in adultery.<sup>2</sup> The discretion of the court may be influenced in favor of the wife where the evidence in the case was not free from doubt, or where the husband has not been free from fault. All the equities of the case are then entitled to some weight, and the court may alleviate the harshness of the decree by the amount of the allowance. In an Illinois case these considerations are thus commented upon: "In the present case it appears that the husband has ample property for a comfortable maintenance for himself and family. The labor and frugality of the wife have contributed to its acquisition. She has passed the meridian of life and is without a separate estate. If the evidence does not show she was entirely justified in deserting her husband, it lacks so little that the difference is almost inappreciable. It is equitable that the husband, out of his abundance, should contribute to her sup-

guilty wife in all cases unless she  
has committed adultery. Dicker-  
son *v.* Dickerson, 26 Neb. 318; State  
*v.* Smith, 19 Wis. 531.

<sup>1</sup> Spitler *v.* Spitler, 108 Ill. 120,  
and cases cited. Approved in  
Luthe *v.* Luthe, 12 Colo. 421.

<sup>2</sup> Spitler *v.* Spitler, 108 Ill. 120.  
See, also, Hickling *v.* Hickling, 40  
Ill. Ap. 73; Spaulding *v.* Spaulding,  
133 Ind. 122, 32 N. E. 224, and  
cases cited.

port, to prevent her becoming a burden upon others, even if her conduct had been far more objectionable than it is proved to have been.”<sup>1</sup>

**§ 908. The amount of the permanent allowance.**—There is no absolute rule for determining the amount which the wife should receive when an absolute divorce is rendered. It is not a proportion of the husband’s income or of his property. The amount is determined by the equities of the case and the financial condition of the parties. The terms of the statutes provide the only rule, perhaps, which is possible in the nature of the case. We find the following expressions in the statutes: “Such allowance as the court shall deem just;” “having regard to the circumstances of the parties respectively;” “suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just;” “such decree . . . as the circumstances of the case shall render just and proper;” and other similar phrases, conferring a broad and liberal discretion upon the courts to consider all the circumstances of the case, and to make such provision for the wife as the equities of the case require. Some aid may be derived from the observations of the courts as to the considerations which should influence judicial discretion in arriving at the amount of alimony. “The power which the statute confers,” says one court, “is to make such allowance as the court shall deem just, having regard to the circumstances of the parties; that is, the amount and income of the husband’s estate and the other duties and burdens chargeable upon him, and the rank and condition in life of the wife. On a divorce for adultery, the considerations governing the amount of alimony are essentially of a pecuniary nature. If the defendant have the ability to pay, the injured party is to recover such an allowance as will correspond with her social position, and at least maintain her in the style and condition that her husband’s

<sup>1</sup> *Deenis v. Deenis*, 79 Ill. 74. See, 28; *Gooden v. Gooden*, 1891 Prob. also, *Davis v. Davis*, 86 Ky. 32; 395. For award to guilty husband, *Midwinter v. Midwinter*, 1892 Prob. see *Abel v. Abel* (Ia.), 56 N. W. 442.

fortune would have reasonable justified her maintenance but for his infidelity. She is not to be put on a stinted allowance because the husband has been unfaithful to his marriage vows; but this is rather a reason, if his estate be ample, that should receive a generous and liberal support. The law allots no definite proportion of the husband's estate for alimony, but leaves the court to award such sum as in the discreet exercise of the power, and having regard to the circumstances of the parties, shall be deemed just. As no two cases are alike, what would be just in one might be unjust in another. Where the husband is possessed of a large estate and has no children or relatives dependent on his bounty, and the wife occupies a high social position and is a lady of refined and intellectual tastes, it would be just to award such a sum as would be ample to maintain her in the state to which she has been accustomed, though such sum was one-third or even one-half of his income. On the other hand, where the estate of the husband is limited, and he has duties or burdens chargeable upon him, and the wife's condition and station in life is comparatively humble, it would not accord with a just sense, nor would there be a fitness and propriety in it, to strip the husband of the bulk of his property and bestow it on the wife. On adjusting the allowance where there has been a divorce for adultery, as it is an act of judicial discretion, the court may take into account imputations against the wife, and even her moral delinquencies, after judgment has passed in her favor; but under the statute, and in harmony with the course of judicial decision, the main and legitimate subjects of inquiry are the proper measure of the wife's expenditures, the amount and income of the husband's estate, and other duties or burdens chargeable upon him.”<sup>1</sup>

<sup>1</sup> *Forrest v. Forrest*, 25 N. Y. 501-515. Mr. Bishop lays down the following principles for the allotment of alimony on a decree for absolute divorce: “*First*. The innocent party should not be left to suffer pecuniarily for having been compelled, by the conduct of the other, to seek the divorce. *Second*. The wife, made thus in a cer-

The decree must be equitable and not oppressive. The circumstances of the husband must always be considered. The decree should, as far as possible, provide a suitable maintenance for the wife without impairing the capital of the husband or confiscating his ready means. It is an abuse of discretion to allow the wife so large an amount of real and personal property as to destroy the husband's business, when a gross sum might have answered the same purpose.<sup>1</sup>

The object of the English divorce court in fixing a permanent maintenance and adjusting the property rights of the parties is to place the innocent party, as far as practicable, in the same pecuniary condition as before the marriage was dissolved.<sup>2</sup> The leading principle in such cases seems to be, "*The innocent party should not be left to suffer pecuniarily for having been compelled, by the conduct of the other, to seek divorce.*"<sup>3</sup> Accordingly the innocent wife should receive the same support as if the parties had continued to live together.<sup>4</sup> If, however, the wife has separate property, or an inchoate right of dower, the court must allow compensation for her property rights in addition to her ordinary maintenance. In many cases, but not in all, an admirable equity may be accomplished by treating the wife as if the marriage had been dissolved by death, and allowing her the rights of a widow in both personal and real property.<sup>5</sup> Such a rule, if followed in all cases, would deprive the court of the discretionary power to regulate the amount according to the conduct of the parties and the necessities of the

tain sense a widow, should not usually be set back simply where she stood in point of property when she entered the marriage. She has given her time, her vir-

ginity, her earlier bloom, where she has been awarded only with ill-faith in return for her faith. *Third.* She should not stand worse than if death, instead of divorce, had dissolved the connection." Ap-

proved in *Calame v. Calame*, 24 N. J. Eq. 440.

<sup>1</sup> *Raymond v. Raymond*, 12 Ill. Ap. 172. See, also, *Rea v. Rea*, 53 Mich. 40.

<sup>2</sup> *Benyon v. Benyon*, 1 P. D. 447.

<sup>3</sup> *Mussing v. Mussing*, 104 Ill. 126; *Johnson v. Johnson*, 36 Ill. Ap. 152.

<sup>4</sup> *Packard v. Packard*, 84 Kan. 53; *Boyce v. Boyce*, 27 N. J. Eq. 433.

<sup>5</sup> *Thornberry v. Thornberry*, 4 Litt. (Ky.) 251 (1823).

case. Another rule is that "where the wife, by her industry and economy, has contributed to the accumulation of the property, and where the divorce has been granted to her on account of the misconduct of the husband, . . . she should not be placed in a worse condition than if she had survived her husband; otherwise the husband would be permitted to take advantage of his own wrong."<sup>1</sup> And this rule is approved so far as it fixes the minimum amount of the allowance.<sup>2</sup>

A just and equitable allowance made upon a decree dissolving the marriage must compensate the wife for all damages which she may sustain, and place her in a financial condition as good as if the marriage had continued. Equity requires that the husband should not profit by his own wrong. The court, in estimating what allowance will be proper under the circumstances, should consider all the property rights of the wife separately. The allowance is not to be a mere provision for the continued support of the wife, but is a composite sum having one or more of the following elements according to the circumstances of the case:

1. Compensation for the wife's property rights.<sup>3</sup>
  2. Compensation for injuries.<sup>4</sup>
  3. Compensation for the loss of support.<sup>5</sup>

It will be noticed that upon a divorce *a mensa* the first two elements do not form a part of, or in any way influence, the amount of the allowance. For this reason it is necessary to distinguish between the allowance on absolute divorce and the permanent alimony of the common law on a decree *a mensa*. The reason of the common law applies only to the last two elements; and where neither husband nor wife has property, and the decree is based upon his income, the allowance is substantially that of the permanent alimony of the common law.

<sup>1</sup> *Musselman v. Musselman*, 44 Ind. 106.  
<sup>2</sup> *Graft v. Graft*, 76 Ind. 136.

<sup>2</sup> *Graft v. Graft*, 76 Ind. 136.

**§ 909. Compensation for the wife's property rights.**—We have seen that the decree for a permanent allowance is a final adjudication of all property rights between the parties. After such decree neither party has any claim upon the other of any kind. The parties have in the proper tribunal and at an appropriate time had an opportunity to litigate their property rights, and the decree is presumed to be an adjudication of all matters which might have been tried in such action. It follows that in estimating the proper amount for the wife all her claims against the husband must be considered.

One element in the permanent allowance is the compensation for the wife's contribution to the common fund. What she has contributed was for the benefit of both, and if so applied should be in part restored, if the husband's means are sufficient. This restoration may be accomplished by a division of the property, by the return of specific property, or by including the value of her contributions in estimating the allowance. If the decree is rendered by a court of equity, it seems clear that the husband may be ordered to restore specific property to the wife.<sup>1</sup> In some states the power to restore separate property to the wife is derived from statute.<sup>2</sup> In various circumstances the husband will be relieved from restoring the wife's separate property or its equivalent; as where the money or proceeds of the property have been consumed by the family, and the hus-

<sup>1</sup> *Vincent v. Parker*, 7 Paige, 65; *v. Day*, 2 Pick. 316; *Page v. Estes*, *Holmes v. Holmes*, 4 Barb. 295. 19 Pick. 269; *Grubb v. Grubb*, 1 See, also, *A. v. M.*, 10 P. D. 178; *Har. (Del.)* 516; *Handlin v. Handlin*, 37 W. Va. 486; 16 S. E. 597; *Wood v. Wood*; 14 P. D. 157. It is almost a matter of course for the court to apportion the household furniture. But see *contra* on a decree of separation, *Doe v. Doe*, 52 Jackson *v. Jackson*, 1 MacAr. 34; *Hun*, 405. *Dillon v. Starin (Neb.)*, 63 N. W. 12. Where the court allows the wife a sum in lieu of her equitable interest in the lands purchased with her money the legal title to

<sup>2</sup> *Chase v. Phillips*, 153 Mass. 17; *Tayman v. Tayman*, 2 Md. Ch. 393; *Flood v. Flood*, 5 Bush, 167; *Dean v. Richmond*, 5 Pick. 461; *Kriger* which is in the husband, the value of her interest should be carefully estimated, as the decree deprives

band has only sufficient means to support the family.<sup>1</sup> Generally the courts do not attempt to restore specific property, but accomplish the same purpose by estimating the amount of property the wife brought to the common fund at marriage, or subsequently contributed by her, and increasing the allowance accordingly.<sup>2</sup> Where she has made no contributions the allowance is smaller, and is based on other considerations.<sup>3</sup> The fact that she had no separate estate, but holds property conveyed to her by her husband, is not a bar to an allowance; but the income from the property is deducted from the estimate of the proper allowance.<sup>4</sup> If the wife had no property at marriage, and contributed nothing except her services during the time the parties lived together, she is not entitled to a very liberal award of alimony.<sup>5</sup> Where the property has been acquired by joint effort the allowance should be liberal.<sup>6</sup> In such case an equal division would seem to be a proper basis; but that proportion might be increased where the husband is guilty of some serious offense against the wife.

The loss of the inchoate right of dower is another element of the damages incurred by the wife on a total divorce. She ceases to be his wife and cannot inherit as his widow, for the total divorce terminates all her non-vested

her of all equitable interest in the land. *Brooks v. Akeny*, 7 Or. 461.

<sup>1</sup> See other circumstances in *Dean v. Dean*, 5 Pick. 428; *Warner v. Warner*, 33 Miss. 547; *Hagerty v. Harwell*, 16 Tex. 663; *Sharp v. Sharp*, 34 Tenn. 496; *Whittier v. Whittier*, 11 Fost. (N. H.) 452; *Jennings v. Montaigne*, 2 Gratt. 350; *Lishey v. Lishey*, 2 Tenn. 1, and cases cited. Where the husband and his family occupied the wife's house during the suit for divorce, the husband is not liable to her for the use of the property. *Edwards v. Edwards* (Miss.), 15 So. 42.

<sup>2</sup> *Wilson v. Wilson*, 102 Ill. 297; *Wilde v. Wilde*, 37 Neb. 891; *Ressor v. Ressor*, 82 Ill. 442; *Atkins v. Atkins*, 13 Neb. 271; *McConahey v. McConahey*, 21 Neb. 463; *Cummings v. Cummings*, 50 Mich. 305; *Robbins v. Robbins*, 101 Ill. 416.

<sup>3</sup> *Id.; Leach v. Leach*, 46 Kan. 724, 27 P. 131.

<sup>4</sup> *Cole v. Cole*, 27 Wis. 531.

<sup>5</sup> *Yost v. Yost* (Ind.), 41 N. E. 11.

<sup>6</sup> *Gercke v. Gercke*, 100 Mo. 237, 13 S. W. 400; *Musselman v. Musselman*, 44 Ind. 106; *Sesterhen v. Sesterhen*, 60 Ia. 301; *Hedrick v. Hedrick*, 128 Ind. 522.

rights dependent on the marriage. In some states this element is not included in the estimate, as the statute provides that on divorce the right to dower accrues as if the husband were dead.<sup>1</sup> Yet in these states it is competent for the court to make an allowance in lieu of dower.<sup>2</sup> The court would have no authority to include the value of the dower right in an allowance on a decree *a mensa*, as such partial divorce does not terminate the right of dower.<sup>3</sup> A provision in lieu of dower on such decree would not bar the right of dower.<sup>4</sup> Where a provision is made for the wife on a total divorce, either in a decree for alimony or in a decree entered in conformity to the agreement of the parties, such provision is presumed to be in lieu of dower.<sup>5</sup> And this is true although the statute provide that the wife is entitled to dower on divorce in her favor as if the husband were dead.<sup>6</sup> The court may award an allowance in lieu of dower, although the statute preserves the right of dower after divorce.<sup>7</sup>

The value of the inchoate right of dower is not to be estimated as if the husband were dead, unless the statute so provide. The value of the right will depend upon the possibility of the wife surviving the husband, as shown by the age and health of each party, and other circumstances.<sup>8</sup>

**§ 910. Compensation for injuries.**—The suit for divorce is not an action in tort to recover damages inflicted by a cause for divorce. To recompense the injured party, and relieve him or her from the obligations of the marriage, might be exact justice between the parties; but it is clear that such a rule would place the marriage relation upon the same level as parties bound by an ordinary contract,—a po-

<sup>1</sup> *Percival v. Percival*, 56 Mich. 297, 22 N. W. 807; *Orth v. Orth*, 69 Mich. 158, 37 N. W. 67; *Lamkin v. Knapp*, 20 O. St. 454; *Crane v. Fipps*, 29 Kan. 585.

<sup>2</sup> *Owen v. Yale*, 75 Mich. 256, 42 N. W. 817; *Tatro v. Tatro*, 18 Neb.

<sup>3</sup> 395; *Plaster v. Plaster*, 47 Ill. 290.

<sup>4</sup> *Taylor v. Taylor*, 93 N. C. 418.

<sup>5</sup> *Crain v. Cavana*, 36 Barb. 410.

<sup>6</sup> *Tatro v. Tatro*, 18 Neb. 395; *Adams v. Storey*, 135 Ill. 448.

<sup>7</sup> *Tatro v. Tatro, supra*.

<sup>8</sup> *Reed v. Reed*, 86 Mich. 600; *Owen v. Yale*, 75 Mich. 256, 42 N. W. 817.

<sup>9</sup> *Gercke v. Gercke*, 100 Mo. 237, 13 S. W. 400.

sition repugnant to sound public policy. The husband's misconduct is only an element in the composite sum which is to be allowed the wife. The statute requiring the amount to be fixed with "due regard to the circumstances of the parties" requires the court to consider the nature of the husband's offense. "The wife," says Mr. Bishop, "should not ordinarily be set back simply where she stood in property when she entered the marriage; she has given her time, her virginity, her earlier bloom, where she has been rewarded with ill-faith in return for her faith." So the ecclesiastical courts considered the nature of the husband's offense, and its effect upon the wife, and regulated the amount accordingly.<sup>1</sup> Our courts have followed the same principle, and to some extent rewarded the wife for meritorious conduct and made some reparation for the cruelty and hardship endured during the marriage.<sup>2</sup> Where the husband has communicated a venereal disease to the wife and thereby permanently injured her health, such fact may be considered in fixing the amount of alimony.<sup>3</sup> The fact that judicial discretion is influenced by the nature of the husband's *delictum* has led some of our courts to consider alimony as compensation for the injury inflicted by the misconduct and by the breach of the marriage contract to love and cherish. And there are some recent adjudications that alimony is a compensation for her injuries.<sup>4</sup> The allowance, as we have seen, is a composite sum, and the compensation to the wife for the tort inflicted by the husband is but one element of that sum. It would be better to consider the permanent

<sup>1</sup> See leading case, *Cooke v. Cooke*, *Pauly v. Pauly*, 69 Wis. 419; *Ensler v. Phillim.* 40, in § 901. See, also, *v. Ensler*, 72 Ia. 159; *Mussing v. Rees v. Rees*, 3 *Phillim.* 387; *Durant v. Durant*, 1 *Hag. Ec.* 528; *Smith v. Smith*, 2 *Phillim.* 235; *Mytton v. Mytton*, 3 *Hag. Ec.* 657; *Otway v. Otway*, 2 *Phillim.* 109.

<sup>2</sup> *Burr v. Burr*, 7 *Hill* (N. Y.), 207; *Turrell v. Turrell*, 2 *Johns. Ch.* 391; *Lishey v. Lishey*, 2 *Tenn. Ch.* 1; *v. Stearns* *v. Stearns* (Vt.), 28 A. 875; *In re Spencer*, 83 Cal. 460, 23 P. 395; *Pauly v. Pauly*, 69 Wis. 419.

<sup>3</sup> *Gusman v. Gusman* (Ind.), 39 N. E. 918.

allowance as damages for the breach of the marriage contract.

**§ 911. Compensation for loss of support.**—The permanent allowance is principally an equivalent for the loss of the support of the husband. The obligation of support is assumed by the husband at marriage, and on divorce for his fault he is not relieved of this duty, but the general obligation is continued by the decree for alimony. The fact that the husband has no property does not relieve him from this obligation. If the wife has separate property, or he has conveyed property to her, and either is sufficient for her support, no allowance need be made; but if either is inadequate the deficiency must be supplied by an allowance.

**§ 912. The husband's income and property.**—In determining the amount to be allowed the wife on a decree dissolving the marriage, the property of the husband, both real and personal, whether productive or non-productive, will be considered. The house occupied by him may be treated as part of his resources, and its rental value estimated as a part of his income.<sup>1</sup> The inquiry extends to the date of the divorce, and property acquired during the suit may be included in the estimate.<sup>2</sup> But it is doubtful if anything further than vested interests should be considered.<sup>3</sup> After an absolute divorce the wife would have no interest in property inherited by the husband.<sup>4</sup> The property must be estimated at its fair market value and not its speculative or prospective value or its value at forced sale.<sup>5</sup> United States bonds should not be estimated at the par value but at the market value.<sup>6</sup> Under proper pleadings the fraudulent con-

<sup>1</sup> Brisco *v.* Brisco, 2 Hag. Con. 199; Cooke *v.* Cooke, 2 Phil. 40; De Blaquire *v.* De Blaquire, 3 Hag. Ec. 322. Harris *v.* Harris, 1 Hag. Ec. 351; Bruere *v.* Bruere, 1 Curt. Ec. 566.

<sup>4</sup> Van Orsdal *v.* Van Orsdal, 67 Ia. 35. But see *contra*, Reed *v.* Reed,

<sup>2</sup> Sparhawk *v.* Sparhawk, 120 Mass. 390. See, also, Cralle *v.* Cralle, 79 Va. 182, 84 Va. 198. 86 Mich. 600; Johnson *v.* Johnson, 36 Ill. Ap. 152.

<sup>5</sup> Segelbaum *v.* Segelbaum, 39 Minn. 258.

<sup>3</sup> Stone *v.* Stone, 3 Curt. Ec. 341; 6 Thomas *v.* Thomas, 41 Wis. 229.

veyances of the husband may be set aside and the property included in the estimate. Real property situated beyond the jurisdiction of the court may be considered as part of the resources of the husband. And so may pensions granted by the United States for disabilities acquired in the service.<sup>1</sup> Where the husband has health, business experience and ability, or has a profession or occupation of any kind, the amount which he usually derives from his personal exertions may be added to his income from other sources.<sup>2</sup> But in this estimate of his future income his age and health must not be overlooked.<sup>3</sup> The court may include, as a part of the husband's income, the earnings of the children while in their minority.<sup>4</sup>

The gross income and the gross amount of property having been computed, a reduction must be made for all *bona fide* debts of the husband, the expenses of the business, and the necessary repairs and improvements for his real estate, and also all taxes on both personal and real property.<sup>5</sup> In arriving at the net income of the husband no deduction is made for his personal and household expenses. The amount necessary for the support and education of the children is not deducted from his net income, but is taken into consideration in fixing the allowance for the wife. A deduction should be made for amounts due on the husband's insurance policies, whether payable to the wife, his creditors or his heirs. If the policy can be converted into money at any time, the surrender value may be considered in the estimate of the husband's property.<sup>6</sup> In estimating the future income

<sup>1</sup> *Hedrick v. Hedrick*, 128 Ind. 522, 26 N. E. 768. S. W. 878; *Freeman v. Freeman* (Ky.), 13 S. W. 246.

<sup>2</sup> *Pauley v. Pauley*, 69 Wis. 419, 34 N. W. 512; *Logan v. Logan*, 90 Ind. 107; *Battey v. Battey*, 1 R. I. 212; *Holmes v. Holmes*, 29 N. J. Eq. 9; *Small v. Small*, 28 Neb. 843; *Butler v. Butler*, 38 N. J. Eq. 626; *Carlton v. Carlton*, 44 Ga. 216; *Verner v. Verner*, 64 Miss. 184. 4 *Mussing v. Mussing*, 104 Ill. 126. 5 *Newsome v. Newsome* (Ky.), 25 S. W. 878.

<sup>3</sup> *Newsome v. Newsome* (Ky.), 25

6 *Forster v. Forster*, 2 Swab. & T. 553; *Frankfort v. Frankfort*, 4 Notes Cas. 280; *Harris v. Harris*, 1 Hag. Ec. 351; *Pemberton v. Pemberton*, 2 Notes Cas. 17.

of the husband, the nature of the securities which he holds, and the probable profits of his business, are to be determined. The fact that the husband has sustained losses by speculation, and for some time has had no profit from his investments, does not excuse him from the payment of an allowance based upon a fair income from his property under proper management.<sup>1</sup> The fact that the husband's investments are not yielding an income will not deprive the wife of alimony, for the value of the investments will be estimated and alimony based thereon.<sup>2</sup>

**§ 913. The wife's income and property.**—The income and property of the wife are estimated in the same manner as the estate of the husband. Her earnings and her ability to earn are an important element in the estimate where she has been accustomed to labor of any kind.<sup>3</sup> Where the wife has any means of support, the fact has an important bearing on the amount of alimony. Under the principles of the permanent alimony of the common law, the wife was not entitled to alimony if she possessed an income proportionate to her husband's or had adequate means of her own.<sup>4</sup> The object of the estimate being a suitable proportion of the joint income, the income of the wife was added to that of the husband, and a suitable proportion for the wife was estimated on this aggregate sum. The wife's income was then deducted from the suitable proportion, and the remainder was the amount of her allowance.<sup>5</sup> If the allowance is to be made on a decree dissolving the bonds of matrimony, this method of calculation would not apply; the permanent allowance being a compensation for property rights, etc., which would otherwise be lost on a dissolution of the marriage. Property derived from the husband is included in

<sup>1</sup> *Neil v. Neil*, 4 Hag. Ec. 273; <sup>4</sup> *Bremner v. Bremner*, 3 Swab. & *Theobald v. Theobald*, 15 P. D. T. 249.

26.

<sup>5</sup> 2 *Bishop, Mar., Sep. & Div.*,

<sup>2</sup> *Close v. Close*, 10 C. E. Green, § 1012, citing *Cooke v. Cooke*, 2 *Phillim.* 40; *Street v. Street*, 2 *Add.* 434.

<sup>3</sup> *Goodheim v. Goodheim*, 2 Swab. & T. 250. <sup>6</sup> *Ec. 1; Morse v. Morse*, 25 Ind. 156; *Cole v. Cole*, 27 Wis. 531.

the estimate, and if sufficient compensation, or equal to the amount of alimony which she would otherwise receive, no allowance will be made.<sup>1</sup>

**§ 914. The support of the children.**—In fixing the amount of the allowance the court must not overlook the support of the children of the parties. The husband is not liable for the support of his step-children, and no deduction is allowed for their support.<sup>2</sup> Before the order for permanent allowance is made, the custody of the children should be determined. If the husband retain them in his custody or if he remain liable for their support, the alimony should be diminished accordingly.<sup>3</sup> If his property and income are barely sufficient for the support of himself and children, alimony may be refused.<sup>4</sup> For the claims of the children are paramount to that of the wife.<sup>5</sup> The fact that some of the children are grown up and have been provided for, or are able to support themselves, should not be overlooked.<sup>6</sup> The allowance must be greater where the wife retains the custody of the children.<sup>7</sup>

The amount necessary for the support and education of the children should be first determined, and the allowance to the wife can be based upon the remainder of the husband's property.

**§ 915. Agreements relating to alimony.**—The agreement of the parties with reference to the permanent allowance is valid, and it will generally be approved by the court, and a decree may be entered in conformity to it.<sup>8</sup> Agree-

<sup>1</sup> Stevens *v.* Stevens, 49 Mich. 504. stead is exempt from wife's claim,

<sup>2</sup> Freeman *v.* Freeman (Ky.), 13 S. W. 246. Biffle *v.* Pullman, 114 Mo. 50, 21 S. W. 450.

<sup>3</sup> Coon *v.* Coon, 26 Ind. 189; Metzler *v.* Metzler, 99 Ind. 384; Luthe *v.* Luthe, 12 Col. 421; Graft *v.* Graft, 76 Ind. 136; Sesterhen *v.* Sesterhen, 60 Ia. 301.

<sup>4</sup> See Ensler *v.* Ensler, 72 Ia. 159.

<sup>5</sup> Eidenmuller *v.* Eidenmuller, 37 Cal. 364. See also when home-

<sup>6</sup> Jeter *v.* Jeter, 36 Ala. 391; Berryman *v.* Berryman, 59 Mich. 605.

<sup>7</sup> Scragg *v.* Scragg, 18 N. Y. Supp. 487.

<sup>8</sup> See construction of such decrees and agreements. Storey *v.* Storey, 23 Ill. Ap. 558, 125 Ill. 608; Allison

ments to pay the wife a certain sum in lieu of alimony on condition that she obtain a divorce are collusive and contrary to public policy; and where such agreements are not disclosed to the court the wife will be entitled to dower as if no alimony had been awarded.<sup>1</sup> Such agreements must be free from collusion or fraud; and the court may investigate the circumstances of the parties and the nature of the agreement for the protection of the public as well as of the wife.<sup>2</sup> The court is not bound by the agreement relating to alimony; and if the amount is not considered sufficient, an additional allowance may be made, or the agreement may be ignored and an adequate allowance made for the wife.<sup>3</sup>

**§ 916. Other circumstances which determine the amount.**—In addition to the elements of the allowance and the pecuniary circumstances of the parties there are other circumstances which influence judicial discretion and have some weight in determining the amount of the allowance. The respective ages of the parties and the duration of their marriage are frequently commented upon by the courts.<sup>4</sup> The wife's age, and her condition of health, may justify an

v. Allison (S. Dak.), 58 N. W. 563; Misc. 511, the parties entered into Cheever v. Wilson, 9 Wall. 108; Wilson v. Wilson, 45 Cal. 399. For agreements that will be approved, see Calame v. Calame, 25 N. J. Eq. 548; Martin v. Martin, 65 Ia. 255; Carson v. Murry, 8 Paige. 483; Miller v. Miller, 64 Me. 484; Barbour v. Barbour (N. J. Eq.), 24 A. 227; Crews v. Mooney, 74 Mo. 26; Petersine v. Thomas, 28 O. St. 596; Buck v. Buck, 60 Ill. 242; Olney v. Watts, 43 O. St. 499, 3 N. E. 354.

<sup>1</sup> Seeley's Appeal, 56 Conn. 202.

<sup>2</sup> Gracey v. Gracey, 17 Grant Ch. 113; Chapin v. Chapin, 135 Mass. 393.

<sup>3</sup> Dailey v. Dailey, 30 N. Y. Supp. 337; McLaren v. McLaren, 33 Ga. (Supp.) 99. In Dailey v. Dailey, 9

4 Burr v. Burr, 7 Hill (N. Y.), 207; Lovett v. Lovett, 11 Ala. 763; Ressor v. Ressor, 82 Ill. 442; Ensler v. Ensler, 72 Ia. 159, 33 N. W. 384; Miller v. Miller, 6 Johns. Ch. 91; Freeman v. Freeman (Ky.), 13 S. W. 246; Newsome v. Newsome (Ky.), 25 S. W. 878; Varney v. Varney, 58 Wis. 19.

increased allowance.<sup>1</sup> If the husband is able to support himself only, and the wife is in feeble health, the larger portion of the property may be set apart for the wife.<sup>2</sup> The amount of the allowance should not be large where the wife is young and healthy, brought no property to her husband, and did not aid him in accumulating any. This is especially true where she obtained a divorce for the purpose of marrying him, and lived with him but a short time.<sup>3</sup> Where the husband was seventy-five years old, and was the fourth husband of the wife, and she was his seventh wife, and the parties lived together about fourteen months, during which time she refused to perform the duties of a wife, the sum of \$100 was held a sufficient allowance on an absolute divorce for his abandonment, although his property was estimated at \$2,500.<sup>4</sup> Where the husband was sixty-eight, and the wife but forty, and he was a cripple, and scarcely able to support himself and his children by a former wife, the sum of \$450 alimony was held excessive, and the supreme court, not being satisfied that the evidence warranted a divorce, allowed the decree to stand, but denied all alimony to the wife, although the husband had a home worth \$1,500, and about \$200 in money.<sup>5</sup> Where the wife had deserted the husband or been guilty of other misconduct which was conducive of the adultery complained of, her allowance will be less than if she had been discreet.<sup>6</sup> The amount is less where

<sup>1</sup> *Doolittle v. Doolittle*, 78 Ia. 691, 43 N. W. 616; *Gercke v. Gercke*, 100 Mo. 237, 13 S. W. 400; *Finlay v. Finlay*, Milward, 575; *Lynde v. Lynde*, 4 Sandf. 373.

<sup>2</sup> *Webster v. Webster*, 64 Wis. 438. "A case might occur where it would be eminently proper to vest the title to all the real estate of the husband, and vest the same in the wife, especially where the husband is in fault, causing the judgment for divorce. The ability of the husband to earn money for

his own support, or for the support of his wife, may be so limited that it would be better for both parties that no order for support be made, and that in lieu thereof the real property be given to the wife."

<sup>3</sup> *Cummings v. Cummings*, 50 Mich. 305.

<sup>4</sup> *Tumblesome v. Tumblesome*, 79 Ind. 558.

<sup>5</sup> *Ensler v. Ensler*, 72 Ia. 158.

<sup>6</sup> *Peckford v. Peckford*, 1 Paige, 274.

there are palliating circumstances in favor of the husband, or where the wife is partly in fault.<sup>1</sup>

**§ 917. Allowance where the husband has no property.**—It has been held that on a dissolution of the marriage the court may allow the wife a portion of the husband's income from property, but if he has no property the court cannot bind his future earnings and savings.<sup>2</sup> But where the court is empowered to exercise a liberal discretion in making a suitable provision for the maintenance of the wife, it is held that alimony may be awarded where the husband has no personal or real property.<sup>3</sup> The wife must be placed in as good a position as she was before marriage, when she derived her support from his personal exertions. During marriage the obligation of support continues although he has no property, and the court may consider his income from personal services as well as from any other resources. And it seems that, if the husband is temporarily out of employment, this will not prevent a decree for alimony, as the court may consider his ability to earn when employment is found.<sup>4</sup> Where the income is from personal labor, the court should consider the health, age and habits of the parties, their man-

<sup>1</sup>Beall *v.* Beall, 80 Ky. 675; Severn *v.* Severn, 7 Grant Ch. (U. C.) 109.

<sup>2</sup>In this case the statute empowered "the court in all cases of divorce to decree to the wife so divorced such part of the real and personal property of the husband as the court shall think proper, having reference, of course, to all those considerations which properly belong to the determination of the question." Upon an absolute divorce it was held that "the wife can have no claim on the future earnings or acquisitions of the husband, any more than upon his protection, society or other conjugal rights or duty; he is alike discharged from them all. And

if, upon the divorce, nothing can be given to her, or less than may be suitable to her rank and condition in life, by reason of the husband's poverty, it is her misfortune, to which she must submit." Chenault *v.* Chenault, 37 Tenn. 247; approved in Boggers *v.* Boggers, 65 Tenn. 299. See, also, Feighly *v.* Feighly, 7 Md. 537.

<sup>3</sup>Canine *v.* Canine (Ky.), 16 S. W. 367; Bailey *v.* Bailey, 21 Gratt. 43; McCrocklin *v.* McCrocklin, 2 B. Mon. 372; Miller *v.* Miller, 75 N. C. 70; Muse *v.* Muse, 84 N. C. 35; Prince *v.* Prince, 1 Rich. Eq. 282; Parker *v.* Parker, 61 Ill. 369.

<sup>4</sup>Canine *v.* Canine (Ky.), 16 S. W. 367.

ner of living, and estimate what the wife will need for her support under similar circumstances in the future. From this estimated amount the court may deduct what the wife can probably earn by her own exertions, and the result will be a fair allowance for her. For where the wife has been accustomed to labor, her earnings may be considered to reduce the amount taken from the husband's income.<sup>1</sup> Other circumstances may be taken into consideration by the court, and the amount thus obtained may be increased according to the nature of the husband's misconduct, or diminished where it appears that she is not free from fault.<sup>2</sup>

Where the permanent allowance must be paid from the earnings of the husband, a sound discretion would require the court to make such allowance payable in monthly or quarterly instalments, and the decree should be limited to the joint lives of the parties, and to terminate upon the marriage of the divorced wife. Otherwise the husband, if he marries again, may find it impossible to support the second family and the former wife.<sup>3</sup> Where the question is not settled, or the statute is silent upon the power to revise decrees of alimony, the decree should reserve the power to revise such decree from time to time.<sup>4</sup> This form of decree is absolutely necessary to make an equitable allowance to the wife where the husband has no property. And to overlook any of these considerations is perhaps an abuse of discretion.

**§ 918. Pleading and practice.**—There is no uniform practice in making and hearing the application for permanent alimony or allowance. Sometimes the application is a part of the petition for divorce; and this method has some advantages where an injunction is prayed for, or relief is

<sup>1</sup> *McGrady v. McGrady*, 48 Mo. enough where the parties were Ap. 668; *Abey v. Abey*, 32 Ia. 575; equally at fault for the existing *Farley v. Farley*, 30 Ia. 353; *Bursler v. Bursler*, 5 Pick. 427. state of affairs.

<sup>2</sup> See situation of husband in *In Russell v. Russell*, 75 Mich. Spencer, *In re*, 82 Cal. 110, 83 Cal. 572, it was held that an allowance 460.

of two dollars per week was large <sup>4</sup> *Green v. Green*, 12 S. W. 945.

sought against a fraudulent conveyance. Mr. Bishop recommends the ecclesiastical practice, where the application is strictly ancillary, and no mention is made of alimony in the petition and other pleadings for divorce. But the procedure must conform to the local practice, of course. In Wisconsin the practice is to join the application for alimony in the petition for divorce. This is considered the better practice, because "it accords with the analogies of equity practice, by including in the same bill all the allegations of fact upon which it may be necessary for the court to adjudicate for the purpose of a complete determination of all matters involved in this action."<sup>1</sup> In the code states the general practice is to include the application in the petition or the answer. And this is undoubtedly the better practice where ancillary relief is sought against third persons or specific property belonging to the husband.<sup>2</sup> The decree for alimony may be based upon a motion,<sup>3</sup> or upon a petition in an ancillary proceeding.<sup>4</sup> But the decree must be based upon some allegation in the pleadings or the record; otherwise such decree is void.<sup>5</sup>

<sup>1</sup> *Damon v. Damon*, 28 Wis. 510. See, also, *Prescott v. Prescott*, 59 Me. 146.

<sup>2</sup> See *Folerton v. Williard*, 30 O. St. 579; *Remington v. Supr. Ct.*, 69 Cal. 633; *Wilkinson v. Elliott*, 43 Kan. 590, 23 P. 614; *Busenbark v. Busenbark*, 33 Kan. 572; *Sapp v. Wightman*, 103 Ill. 150; *Wharton v. Wharton*, 57 Ia. 696; *Powell v. Campbell*, 20 Nev. 232; *Bamford v. Bamford*, 4 Or. 30; *Harshberger v. Harshberger*, 26 Ia. 503; *Henderson v. Henderson*, 410 Ind. 316. Otherwise the wife would have no relief against third persons. *O'Brien v. Putney*, 55 Ia. 292; *Scott v. Rogers*, 77 Ia. 482, 42 N. W. 377.

<sup>3</sup> *Becker v. Becker*, 15 Ill. Ap. 247; *Roseberry v. Roseberry*, 17 Ga. 139; *Kirch v. Kirch*, 18 N. Y. Supp. 447.

<sup>4</sup> *Bray v. Bray*, 2 Halst. Ch. 27; *Culver v. Culver*, 8 B. Mon. 128; *Longfellow v. Longfellow*, Clarke, 344.

<sup>5</sup> *Cummings v. Cummings*, 75 Cal. 435; *Bender v. Bender*, 14 Or. 355; *Jordan v. Jordan*, 53 Mich. 552; *Clayton v. Clayton*, 1 Ashm. (Pa.) 53; *Chandler v. Chandler*, 13 Ind. 492. In Iowa the rule of ordinary judgments is held to be inapplicable to a decree for alimony; for that is an incident to the divorce, and the court is given full power to make any orders concerning permanent alimony and custody of children, although there is no application for such orders. *Zuver v. Zuver*, 36 Ia. 190; *McEwen v. McEwen*, 26 Ia. 375; *Darrow v. Darrow*, 43 Ia. 411.

Where the application for alimony is made in the petition, the defendant may make any such answer as he desires in the answer to the petition;<sup>1</sup> or, if the application is by motion, affidavits may be filed by the husband showing the extent of his property. The showing made by the husband may be contradicted by counter-affidavits or by the introduction of any competent evidence on the hearing before the court or the officer to whom the question is referred.

<sup>1</sup> *Stearns v. Stearns* (Vt.), 28 A. 875.

## THE DECREE FOR ALIMONY.

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§ 930. In general.	§ 936. Alimony after divorce.
931. Whether in gross or in instalments.	937. When alimony is exempt.
932. When the permanent allowance terminates.	938. The wife as a creditor of the husband.
933. Whether marriage of the divorced wife terminates her alimony.	939. Attachment for contempt.
933a. Revision of decree for alimony.	940. Writ <i>ne exeat regno</i> .
934. When permanent alimony will be revised.	941. Other means of enforcing payment.
935. Alimony where there is no personal service.	942. Suit on foreign decree for alimony.
	943. Suit on decree for alimony rendered in another state.

**§ 930. In general.**—The decree for alimony may form part of the decree of divorce or may be entered as a separate decree. The terms of the decree are fixed by the court in the exercise of a sound discretion, and should state when the alimony commences and upon what events it will terminate. Ordinarily permanent alimony should date from the day it was allowed; but an earlier date may be fixed when the litigation has been protracted by the husband. Where the suit has been delayed for several years it is not an abuse of discretion to date the decree from the commencement of the action.<sup>1</sup> If the decree is based upon a decree *a mensa*, or is granted as a part of the personal earnings of the husband where he has no property, it should terminate upon the death of either party. Where an absolute divorce is rendered and the husband has no property, the decree should terminate upon the marriage of the wife, otherwise the hus-

<sup>1</sup> *Forrest v. Forrest*, 25 N. Y. 501; *McCarthy v. McCarthy* (N. Y.), 38 N. E. 288.

band will be compelled to support the wife of another. If the decree contains, as one of its elements, the compensation to the wife for her contributions to the common fund, or the amount is influenced by the amount of property which she brought to the husband at marriage, or is in part a compensation for her loss of dower, the decree should not terminate upon the death of the wife. The husband should be held to pay the amount to her estate. Nor, in such case, should the marriage of the wife affect her right to alimony any more than the marriage of an ordinary creditor should relieve his debtor. The allowance is not in such case a mere maintenance, to be withdrawn whenever the wife obtains maintenance elsewhere. The decree should make a separate allowance for the wife and each child. Many perplexing questions concerning the allowance may be avoided by definite provisions in the decree for certain contingencies.

**§ 931. Whether in gross or instalments.**—The permanent alimony granted by the ecclesiastical courts was payable in annual instalments. This form of alimony was admirably suited for the circumstances of the parties and their legal and social *status* at that time. The decree from bed and board was only a temporary permission to live apart until the parties were reconciled and the past condoned. No property rights were disturbed or forfeited by such a decree. Under such circumstances the law wisely provided that the alimony should be payable in instalments which could terminate on reconciliation.<sup>1</sup>

<sup>1</sup>See *Hyde v. Hyde*, 4 Swab. & T. 80; *Wilson v. Wilson*, 3 Hag. Ec. 329; *De Blaquiere v. De Blaquiere*, 3 Hag. Ec. 322; *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Haggerty v. Haggerty*, 11 Grant's Ch. 562; *Maguire v. Maguire*, 7 Dana, 181.

In New York it is held an abuse of discretion to award one-third of the value of the husband's prop-

erty payable in three annual payments where a decree of separation is granted. The allowance was changed to \$15 per month. *Sleeper v. Sleeper*, 65 Hun, 454.

The practice of granting alimony on a decree of separation has been discontinued by some of the courts of New York, on account of the present laws affording a better remedy. Where the husband fails

But an absolute divorce, dissolving the bonds of matrimony, was unknown at common law. It places the parties in a position essentially different from a decree from bed and board. The parties are free to marry others or to become reconciled to each other, as they choose. All property rights depending on the marriage are terminated. The allowance granted under such circumstances must be a restoration or a division of property instead of a temporary provision for the wife's support. Such allowance must be made in contemplation of a final settlement of property rights. The situation is therefore so different that the ecclesiastical practice is not always followed by courts having the power to grant absolute divorce. The courts of England may, in granting absolute divorce, allow a gross sum or an annual sum, as the circumstances seem to require.<sup>1</sup> The early practice in our country seems to have been to follow the English precedents, overlooking the fact that the reasons for the allowance after absolute divorce might be different.<sup>2</sup> At present the practice appears to be that the kind of alimony awarded is governed by the circumstances of the case. It is clear that the power conferred by the statute, to make "such order" concerning the "allowance" or "alimony and maintenance" as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just, confers a discretionary power upon the courts to award either a gross sum or a sum payable in instalments.<sup>3</sup> Where the

or neglects to support the wife, her remedy is to have a criminal proceeding commenced against him in the police court, where an order for support may be granted and can be enforced by numerous officers of the court by proceedings of a summary character. *Patton v. Patton*, 13 Misc. 726, citing *Ruopp v. Ruopp*, N. Y. L. J. (March, 1894). Where this remedy may be had, the decree of separation will become useless as a remedy.

<sup>1</sup> *Jardine v. Jardine*, 6 P. D. 213; *Medley v. Medley*, 7 P. D. 122.

<sup>2</sup> *Calame v. Calame*, 25 N. J. Eq. 548; *Purcell v. Purcell*, 4 Hen. & M. 507; *Russel v. Russel*, 4 Greene (Ia.), 26; *Crain v. Cavana*, 36 Barb. 410, 62 Barb. 109; *Almond v. Almond*, 4 Rand. (Va.) 662.

<sup>3</sup> *Calame v. Calame*, 24 N. J. Eq. 440; *Plaster v. Plaster*, 47 Ill. 290; *Barrows v. Purple*, 107 Mass. 428, and cases cited; *Robinson v. Robinson*, 79 Cal. 511, and cases cited;

statute requires alimony to be in gross the decree may award a gross sum payable in instalments.<sup>1</sup> Such decree is in the nature of final settlement, and it would seem to make the husband a creditor of the wife, and would not be subject to revision. In the event of the death or marriage of one or both parties the decree would not be terminated.

Where the court has discretionary power to decree alimony in a gross sum, it was held error to do so where the wife apparently married the husband for his wealth, he having accumulated his property before the marriage and received no property from the wife. In such case it was more just and reasonable that the allowance should be paid in instalments in order that the amount may be increased or diminished by the court, or withdrawn in case she should misconduct herself. The circumstances of the husband would, in this case, make it easy for him to secure the allowance.<sup>2</sup> In the ordinary case, however, it is believed that a gross sum on a specific portion of the property will prove more practical and satisfactory.<sup>3</sup> It will terminate the litigation. The decree will not complicate the husband's property with a lien which is uncertain in amount. If a gross sum is awarded it may be secured by real estate, by a lien or mortgage for a specific amount. The wife then has a specific income that cannot be terminated by the refusal or neglect of the husband. The amount is safe from any act of the husband, and cannot be defeated by his poverty or bankruptcy. The parties in a divorce suit are generally much embittered and estranged, and apt to consider any decree unjust. If the allowance is in instalments the husband is goaded by the apparent injustice of supporting a woman for

Piatt *v.* Piatt, 9 Ohio, 37; Jeter *v.* *v.* Winemiller, 114 Ind. 540; Williams *v.* Williams (S. D.), 61 N.W. 38. Jeter, 36 Ala. 391; Call *v.* Call, 65 Me. 407; Crews *v.* Mooney, 74 Mo. 26. See, also, statutes in Taylor *v.* Gladwin, 46 Mich. 232; Dinet *v.* Eigenman, 80 Ill. 274; Halleman *v.* Halleman, 65 Ga. 476; Winemiller <sup>1</sup>Ifert *v.* Ifert, 29 Ind. 473. <sup>2</sup>Von Glahn *v.* Von Glahn, 46 Ill. 134. <sup>3</sup>McGechie *v.* McGechie (Neb.), 61 N. W. 692; Cochran *v.* Cochran (Neb.), 60 N. W. 942.

whom he entertains the deepest hatred; a woman who is either a legal relict or the wife of another. Under such circumstances the wife will probably be put to great expense and annoyance to recover each instalment as it becomes due.<sup>1</sup>

There are two forms of decrees payable in instalments. One is a decree for a certain gross sum, which, for the convenience of the husband, is made payable in instalments. It is in effect a mortgage securing notes which mature at certain intervals. The other form is a decree for a certain sum payable each month or other period of time. Where the latter form of decree is made a lien upon real estate of the husband it becomes an absolute bar to any conveyance by him. No purchaser could be found for a title encumbered for an amount which is indefinite and subject to be increased upon the further order of the court. For the same reason no mortgage or other security could be negotiated by the husband, as the prior incumbrance is uncertain in amount. This form of decree is not suited to our present system of laws relating to real estate, the policy of which is to render titles perfect, and subject only to liens definite in amount and duration. On the other hand, the decree for a definite sum is not an intolerable burden upon the husband. He may sell his real estate subject to such lien. He may negotiate a mortgage subject to it. Or he may pay the entire sum and thereby remove the lien from his real estate.

In many states the practice appears to be to require the husband to execute a mortgage for the gross sum allowed by the court. Experience has shown that such securities are not as desirable as the decree for a gross sum, as the wife may be compelled to resort to the expense and delay of a foreclosure. The decree for a gross sum has the advantage that, on the failure to pay any amount due, execution may issue at once. The permanent allowance being in the nature of a final settlement, payable in instalments, is a

<sup>1</sup> *Williams v. Williams*, 36 Wis. 362; *McClung v. McClung*, 40 Mich. 493.

fixed debt, and each instalment draws interest from the time it becomes due.<sup>1</sup>

**§ 932. When the permanent allowance terminates.**—When the alimony is payable in instalments the decree should specify the period during which it is to be paid, and the time when it will terminate. It should also terminate by its terms upon such contingencies as the marriage of the wife or the death of either party. The failure to fix such period is an error and perhaps an abuse of discretion, but does not render the decree void<sup>2</sup>.

Perplexing questions will arise where no time is fixed by the decree. If the alimony is allowed on a decree of separation it is clear that it will terminate on the death of either party. But if the allowance is made on a decree of absolute divorce, the only rule that can be laid down is that the nature of the decree will govern. As already stated,<sup>3</sup> there are two kinds of decrees of alimony which may be made payable in instalments. One is a gross sum of money in restitution of the wife's separate property, a settlement of all property rights and other elements which may influence the court in determining the amount which may be reasonable under all the circumstances of the parties. This form is granted only where the parties are absolutely divorced, and is made payable in instalments for the convenience of the husband. The other form of decree is a mere maintenance granted to the wife, payable until the reconciliation of the parties, or while they are separated. It is in form and effect similar to a pension, and must be distinguished from the former decree, which resembles a decree rendered

<sup>1</sup> *Lancaster v. Elliott*, 55 Mo. Ap. 249, 42 Mo. Ap. 503; *Winemiller v. Winemiller*, 114 Ind. 540, 17 N. E. 123.

<sup>2</sup> *Casteel v. Casteel*, 38 Ark. 478. In *Ex parte Hart*, 94 Cal. 254, the decree for alimony after an absolute decree of divorce contained no definite limit, and the defend-

ant refused to pay the same because indefinite and therefore void. But it was held to be sufficiently certain, and contemplated the payment of alimony during the life of the wife or until modified by the court.

<sup>3</sup> § 931.

on a dissolution of a partnership. This distinction is vital to the question when a decree for permanent alimony rendered on an absolute decree of divorce will terminate. In a recent and well-considered case this distinction is pointed out. "The rule," it was said, "which prevailed at common law, that the death of the husband necessarily and of itself put an end to the payment of alimony, was applicable only in divorces *a mensa et thoro*, which did not have the effect of finally and forever terminating the marriage relation, but operated as mere temporary separation, leaving all the other marital rights and obligations in full force. In the case of such divorces, the separation was liable to end at any time by the reconciliation of the parties; and even if no reconciliation took place, the marriage continued to exist until it was dissolved by death. But where, as under the statute of Illinois, alimony is awarded upon a decree of absolute divorce, which at once puts an end to the marriage relation, the right of the divorced wife to have the alimony continued to her out of the estate of her divorced husband will depend upon the nature of the terms of the decree allowing alimony."<sup>1</sup>

So far as the alimony allowed on a decree of separation is concerned it is clear that it terminates on the death of either party. The reason for this is well stated by the court. "Alimony," said Robertson, C. J., "is the maintenance secured by judicial authority, during coverture, or until reconciliation. There being no divorce *a vinculo*, it cannot be right to decree any allowance for the term of the wife's life. If she survive her husband she would also be entitled to dower. At his death the law provides for her; and being then *sui juris*, there is no necessity for a decree for maintenance, nor any suitableness or propriety in such a decree."<sup>2</sup>

<sup>1</sup> *Storey v. Storey*, 125 Ill. 608, reversing 23 Ill. Ap. 558. *Field v. Field*, 15 Ab. N. Cas. 434; *Harte, Ex parte*, 94 Cal. 254; *Knapp v. Knapp*, 134 Mass. 355; *Francis v. Francis*, 31 Gratt. 283; *Casteel v. Casteel*, 38 Ark. 478; *Burr v. Burr*,

<sup>2</sup> *Lockridge v. Lockridge*, 3 Dana (Ky.), 28; *Wallingford v. Wallingford*, 6 Har. & J. 485. See, also,

Where no property rights were included in the decree for alimony and no sum can be allowed in lieu of dower, it is clear that the alimony allowed on an absolute decree of divorce will terminate on the death of either party, if the decree is otherwise in form and effect substantially the same as the alimony or maintenance allowed by the ecclesiastical courts.<sup>1</sup> Thus in those states where the absolute divorce does not terminate the right of dower and the vested rights of the parties are expressly reserved by statute, the decree of alimony is not in lieu of property rights of the wife, but, is in effect a decree for maintenance and terminates upon the death of either party. "If this were not true," observes Van Brunt, J., "we have this anomaly presented to us: that although the amount of permanent alimony depends very largely, in most cases, upon the income of the husband, derived from his personal efforts, that yet, when this source of revenue is entirely withdrawn, his estate is liable for the same amount of alimony, although, if that had been the only source of income, not one-tenth part of the alimony granted would ever have been allowed."

"We are also confronted with this peculiar condition of affairs: if the husband should happen, during coverture, to have been possessed of real estate, the income of the former wife would be greater, the husband being dead, than if he

10 Paige, 20, 7 Hill, 207; Smith *v.* Smith, 1 Root (Conn., 1792), 349; Guenther's Appeal, 40 Wis. 115. See *contra*, Sloan *v.* Cox, 4 Haywood (Tenn.), 75, under a statute now repealed.

<sup>1</sup> For nature and effect of the decree for alimony on a decree of separation, see § 902.

In Knapp *v.* Knapp, 134 Mass. 353, it was held that the wife could recover arrears of permanent alimony due at the time of the death of the husband but no later instalments. The decree was in the same form as the alimony allowed on a decree for separation and was considered to be the same. The court said: "As alimony out of the husband's property is a provision for the support of the wife by him, the obligation to pay it in the future necessarily ceases with the death of the husband; but amounts already due at the time of his death are in the nature of a debt then existing, and are payable out of his estate." Citing Smith *v.* Smith, 1 Root, 349; Wren *v.* Moss, 1 Gilman, 560.

were alive, as she would not only be entitled to receive the alimony granted by the court, but also to recover her dower out of his real estate.”<sup>1</sup>

But in those states where alimony is in fact a decree adjusting and settling all the property rights of the wife, it seems clear that she thereby becomes a creditor of the husband, and the death or marriage of one or both parties will not affect the decree. Thus, in Indiana, where the decree must conform to a statute requiring the alimony to be in a gross sum but may be made payable in instalments, it is held that the term “alimony,” as used in the statute, “is not the alimony of the common law, the right to which ceased to exist or reverted to the husband on the death of the wife, resulting from the fact that the marriage relation continued to exist until her death. But it is alimony under, and the creature of, the statute, given upon an equitable settlement between the parties upon the dissolution of the marriage and of all the relations of husband and wife theretofore existing between them. The reason of the rule at common law (that permanent alimony terminated on the death of the husband) does not exist under the statute, and the rule itself should not therefore be applied.”<sup>2</sup>

<sup>1</sup> *Field v. Field*, 15 Abb. Pr. 434, 66 How. Pr. 346.

<sup>2</sup> *Miller v. Clark*, 23 Ind. 370. In this case the wife was allowed the gross sum of \$1,200, to be paid in instalments as follows: \$200 in six months, \$500 in one year, and \$500 in two years. After the last instalment and interest became due the wife died, and it was held that the administrator might recover the amount due for the benefit of her estate. See similar case, *Dinet v. Eigeman*, 80 Ill. 275.

In *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761, the wife was allowed a decree of alimony in Wisconsin upon her release of dower. The

decree was for a gross sum. She brought an action of debt on this decree in Illinois and attached the husband's property. Afterwards the husband died. It was held that the action would lie, and that the attachment did not abate upon the death of the husband, but might be revived against the administrator of the husband's estate.

In *Maxwell v. Sawyer* (Wis.), 63 N. W. 283, the decree of alimony rendered on an absolute divorce provided for the payment of certain sums semi-annually to be secured by a mortgage and notes for a certain sum. On the death of the husband he left a will provid-

The nature of the alimony, whether a gross sum in lieu of property rights or an order for the maintenance, must be established by competent evidence.<sup>1</sup> It cannot be shown by proof of an oral contemporaneous agreement, before the entry of the decree, that the alimony should continue during the life of the wife. The terms of a decree cannot be affected or contradicted in this manner.<sup>2</sup> In a recent and well considered case the parties had entered into an agreement concerning alimony, and this agreement was incorporated into the decree, which recited such fact. The bond and trust deed executed to secure the performance of the decree provided that the "heirs and assigns" of the husband were entitled to the possession of the real estate until default was made "by him or them." The decree recited that the sum of \$2,000 per annum was to be paid to the wife "so long as she may be and remain sole and unmarried." It was also shown that the husband had conveyed the same real estate in trust, and bound himself, "his heirs, executors, administrators and assigns," to pay the instalments due on the prior trust deed securing the alimony. In consideration of all of these circumstances the decree was construed to be in lieu of property rights, and was not terminated by the death of the husband as in the case of a mere allowance.<sup>3</sup>

It seems that the liberal discretion conferred upon the court to make "*such order*" as may seem just and equitable under all the circumstances gives the court the power, on an absolute divorce, to allow a mere maintenance during the life of the wife.<sup>4</sup> In such case the alimony does not terminate on the death of the husband but may be recovered

ing for the annual payment to the wife of the same sum during her natural life. It was held that the decree was for alimony proper and not a division of property, and therefore it terminated on the death of the husband, and the wife could not recover both the alimony and the annuity under the will.

<sup>1</sup> See on this point *Olney v. Watts*, 43 Ohio, 499, cited in next section.

<sup>2</sup> *Maxwell v. Sawyer* (Wis.), 63 N. W. 283, citing *Freeman on Judgments*, § 836.

<sup>3</sup> *Storey v. Storey*, 125 Ill. 608, reversing 23 Ill. Ap. 558.

<sup>4</sup> *Miller v. Miller*, 64 Me. 484; *Burr v. Burr*, 10 Paige, 20; *Lawton, Pe-*

from his estate. It is held that such decree may be entered upon the agreement of the parties, and does not terminate upon the death of the husband.<sup>1</sup>

**§ 933. Whether marriage of a divorced wife terminates her alimony.**—The solution of this question depends upon the theory of the allowance made by the court upon dissolving the marriage. If alimony is considered a sum in lieu of dower, a compensation and a payment in lieu of a division of property acquired by joint effort, or a decree for a sum brought to the husband at marriage, no subsequent conduct of the wife should release her former husband who has now become her judgment debtor.<sup>2</sup> On the contrary, if the sum awarded is regarded as a kind of pension, an equivalent for the obligation created by marriage to support the wife, and which obligation is released by divorce, then it would follow that when the divorced wife marries another her second husband assumes the obligation of support, and the pension is terminated.<sup>3</sup> Or if the second husband has not sufficient ability, the amount may be reduced if she marries again.<sup>4</sup> Where the wife received a large portion of her husband's property as alimony and also a decree for a monthly allowance, the allowance will be cut off on her marriage to another.<sup>5</sup> The two theories of alimony are not directly in conflict. The facts of each case may show that the court acted upon one theory or the other. For instance, if the husband and wife had no property at marriage and when the divorce was rendered, the allowance may have been made as a pension in lieu of the support which the husband

titioner, 12 R. I. 210; *Smythe v. Banks*, 73 Ga. 303; *Ex parte Winter*, 94 Cal. 254.

<sup>1</sup> *Storey v. Storey, supra*; *Stratton v. Statton*, 77 Me. 373; *Carson v. Murray*, 3 Paige, 483; *O'Hagan v. O'Hagan's Adm.*, 4 Ia. 509; *Lockwood v. Krum*, 34 O. St. 2.

<sup>2</sup> See, also, *Shepherd v. Shepherd*, 1 Hun, 240.

<sup>3</sup> *Stillman v. Stillman*, 99 Ill. 196, reversing 7 Ill. Ap. 524; *Bowman v. Worthington*, 24 Ark. 522. As to this theory, consult *Sidney v. Sidney*, 4 Swab. & T. 178; *Fisher v. Fisher*, 2 Swab. & T. 411.

<sup>4</sup> *Albee v. Wyman*, 10 Gray, 222; *King v. King*, 38 O. St. 370.

<sup>5</sup> *Bankston v. Bankston*, 27 Miss. 692.

was obliged to render under the marriage contract. Or, suppose the husband received a large sum of money from the wife at marriage, and on his obtaining divorce from her the court found it equitable that part of the money be restored to her in instalments as alimony. In such case the remarriage of the wife should not impair the decree. This distinction is made in an Ohio case, where the court, on an application to vacate a decree of alimony on account of the marriage of the divorced wife, remanded the action for a new trial, and suggested that if it should "appear that the former decree, instead of being in the nature of alimony payable in instalments for the support of the wife, was in the nature of a permanent division of the husband's property, and that the parties fixed the same by their agreement or consent, this, if alleged and proved, may furnish a complete defense."<sup>1</sup> Where the alimony awarded to the wife consisted of one-half the personal and the use of one-half of the realty for life, the remarriage of the wife will not terminate the decree, and such fact is not a ground for modifying it.<sup>2</sup>

Much of the confusion on this question is caused by the attempt to denote by the term "alimony" all the various elements and property rights which are merged into one decree. And yet it is believed that where the courts are permitted by statute to revise decrees of alimony from time to time, the facts and circumstances which influenced the court in making the allowance may be proved, and the alimony may be terminated or not according to the circumstances. Where the decree of alimony is held to be a vested right, not subject to revision, the subsequent marriage of the divorced wife will not affect the decree.

Where the husband has no property, the court frequently provides for the support of the wife out of his earnings by a decree containing no provision for its termination on the marriage of the wife. It may happen that both parties may marry again, in which event the former husband has

<sup>1</sup> *Olney v. Watts*, 43 Ohio, 499.

<sup>2</sup> *Sammis v. Medbury*, 14 R. I. 214.

two to support. If his earnings are inadequate and he fails to pay the alimony, he may be thrown in jail, where he will be unable to support either of them. The supreme court of California has characterized this as "an anomalous condition of domestic affairs which requires a man . . . to support a legal relict, who is not only matrimonially dead to him but is perhaps married to another, who is unwilling or unable to support her."<sup>1</sup> The difficulty in such cases may be avoided by limiting the decree for alimony by such phrases as, "until she marries again," or "so long as she remains unmarried." The power of our courts to make this provision is unquestioned. Such provision is not void as being in restraint of marriage.<sup>2</sup> Under the English divorce act the court may, at its discretion, order the payment of alimony during the life of the wife, or so long as she remains unmarried.<sup>3</sup> But such clause is not added to the decree where the object of the decree is to deprive the husband of his interest in the wife's property and to restore her property and her own income.<sup>4</sup>

**§ 933a. Revision of decree of alimony.**—The permanent alimony of the common law was a form of separate maintenance for the wife. No absolute divorce was granted, but the decree was for separation. The marriage relation continued, and the whole proceeding looked forward to a reconciliation and reunion of the parties. Under such circumstances the husband's duty of support remained, and the amount which he should contribute varied according to his means and the needs of the wife. In an early case it was held by Dr. Lushington that, "where there is a material alteration of circumstances, a change in the rate of alimony may be made. If the faculties are improved, the wife's

<sup>1</sup>Spencer, *In re*, 83 Cal. 460, 82 wynd, 1 P. D. 39; Harrison *v.* Har-  
Cal. 110. rison, 12 P. D. 180; Hart *v.* Hart,

<sup>2</sup>Stillman *v.* Stillman, 99 Ill. 196. 18 Ch. D. 670; Corbett *v.* Corbett,

<sup>3</sup>See Lister *v.* Lister, 14 P. D. 175, 13 P. D. 136, 14 P. D. 7.

15 P. D. 4, citing Sidney *v.* Sidney, <sup>4</sup>Gladstone *v.* Gladstone, 1 P. D.

4 Swab. & T. 178; Medley *v.* Med- 442.  
ley, 7 P. D. 122; Chetwynd *v.* Chet-

allowance ought to be increased; and if the husband is *lapsus facultatis*, the wife's allowance ought to be reduced."<sup>1</sup>

But under our statutory divorce the marriage is dissolved and the husband and wife sustain no relation towards each other. The door of reconciliation is no longer open. The alimony allowed to the wife is a sum in lieu of dower and as compensation for the ill treatment she received. The wife is a judgment creditor of the husband, and has no interest in his financial successes. If he inherits wealth, she should not be entitled to an additional allowance. If he fails in business, she will suffer with other creditors unless her claim is secured. The situation of the parties is novel to the common law: the allowance to the wife is not in all respects alimony, and neither the rule nor the reason of the common law is applicable. The failure to make this distinction has led to much confusion in our statutes and decisions. Where the distinction has been brought to the attention of our courts, it has been held that the rule that a decree of alimony is subject to change at any time does not apply to decrees rendered when absolute divorces are granted.<sup>2</sup> And

<sup>1</sup> *De Blaquiere v. De Blaquiere*, 3 for a new trial has elapsed. *Sam-Hag. Ec.* 322. See, also, *Lockridge v. Lockridge*, 2 B. Mon. 528; *Rees v. Rees*, 3 Phillim. 387; *Kirkwall v. Kirkwall, Poynter, M. & D.* 255; *Neil v. Neil*, 4 Hag. Ec. 273.

<sup>2</sup> *Kamp v. Kamp*, 59 N. Y. 212; *Kerr v. Kerr*, 59 How. Pr. 255; *Stratton v. Stratton*, 73 Me. 481; *Olney v. Watts*, 43 O. St. 499. But see, *contra*, *McGee v. McGee*, 10 Ga. 477; *Rogers v. Vines*, 6 Ired. 293; *Lockridge v. Lockridge*, 2 B. Mon. 258.

Where the wife is awarded one-half the personality and one-half of the rents of the husband's realty for life, the decree is final, and, in the absence of statutory authority, cannot be modified after the time

*The same rule applies to a decree for monthly payments. Sampson v. Sampson*, 16 R. I. 456, 16 A. 71.

Where the statute confers on the court the power to modify the decree in respect to the guardianship, custody, support and education of the children, whenever circumstances may render such change necessary, but does not authorize the court to modify the decree for alimony, a decree for alimony in gross, payable in instalments, will not be modified. *Mitchell v. Mitchell*, 20 Kan. 665. See similar construction in *Sampson v. Sampson, supra*.

it is clear that such a decree of divorce may reserve the allowance for future consideration, and in such case the decree is not an adjudication of a matter which by its very terms is left open for determination.<sup>1</sup> In New York, and perhaps other states, the statutes provide for a change in the amount of alimony where the divorce is from bed and board.<sup>2</sup> But where the statutes make no distinction the courts refuse to do so, and will revise an allowance of permanent alimony after an absolute divorce.<sup>3</sup>

The practice in the ecclesiastical courts is not to be followed in such cases. For, as noted in one case, "This allowance to the wife is not in fact alimony in the sense of the ecclesiastical law of England, but is more strictly an arrangement in lieu of a division of the estate of the parties, so as to return to the wife her just portion of that property which mutually belonged to both during the marriage, and which the labor and care of both may have equally contributed to procure and preserve. This allowance was intended to supply the wife with the means of commencing life anew after her expulsion from the household of the husband, and the withdrawal of his liability for her maintenance and support, and place her above actual destitution. Such purpose could best be accomplished by making such allowance absolute and permanent."<sup>4</sup> The courts are authorized to revise and change decrees of alimony by express statutes in some of the states.<sup>5</sup>

<sup>1</sup> *Fries v. Fries*, 1 MacArthur, 291; *Stahl v. Stahl*, 12 N. Y. Supp. 855. But see *Cullen v. Cullen*, 55 N. Y. Superior Ct. 346; *Beck v. Beck*, 43 N. J. Eq. 668.

<sup>2</sup> *Kerr v. Kerr*, 9 Daly, 517; *Simonds v. Simonds*, 10 N. Y. Supp. 606; *Strauss v. Strauss*, 14 N. Y. Supp. 671. See distinction in *Mildeberger v. Mildeberger*, 12 Daly, 195.

<sup>3</sup> *Bauman v. Bauman*, 18 Ark. 320. In *Ellis v. Ellis*, 13 Neb. 91, the lower court granted a division

of the property and afterwards vacated the decree and entered a decree for alimony. The first decree was erroneous, and the court had a right to correct the error under the provisions of the code for modifying decrees after term, but the statute relating to the modification of decrees of alimony was cited and relied upon.

<sup>4</sup> *Smith v. Smith*, 45 Ala. 264.

<sup>5</sup> *Stillman v. Stillman*, 99 Ill. 196; *Wheeler v. Wheeler*, 18 Ill. 39; *Robbins v. Robbins*, 101 Ill. 416; *Call v.*

But it seems that such statutes refer to alimony proper, where it is made payable in instalments for the maintenance of the wife according to the practice of the ecclesiastical courts. Such alimony must be varied according to the changed circumstances of the parties, the diminished means of the husband, or the increased needs of the wife. At the common law the parties were not absolutely divorced, and the husband's liability could be adjusted by the courts while the parties were separated. This was the reason of the rule that the amount of alimony might be increased or diminished. But the rule has no application to alimony in the form of a gross sum or a division of the property. In such case it is held that the gross sum is in lieu of all claims for alimony. "Had it been a yearly sum," suggested one court, "then the alteration of the circumstances of the parties might, in many cases, be such as would require its reduction or increase in amount. But where a gross sum is decreed and received for or in satisfaction, or in lieu of alimony, it must be held to be in full discharge and satisfaction of all claim for future support of the wife. When they are divorced, they from that time forward cease to have claims on each other, and all rights and duties are at an end. Having discharged the duty of her support, by paying to his former wife the gross sum decreed in lieu of alimony, she ceased to have any more claim on her former husband for her support than she has on any other man in the community."<sup>1</sup> Where a division of property is authorized by statute, it is held that the statutes providing for the modification of decrees of alimony do not apply, as the decree is a final settlement.<sup>2</sup>

Call, 65 Mo. 407; *Sheafe v. Sheafe*, 40 Wis. 462; *Thomas v. Thomas*, 41 36 N. H. 155; *Perkins v. Perkins*, 12 Wis. 329; *Blake v. Blake*, 75 Wis. Mich. 456; *Fisher v. Fisher*, 32 Ia. 20; 339.

*Shaw v. McHenry*, 52 Ia. 182; *Blythe v. Blythe*, 25 Ia. 266; *Andrews v. Andrews*, 15 Ia. 423; *O'Hagan v. O'Hagan*, 4 Ia. 509; *Weld v. Weld*, 28 Minn. 83; *Hopkins v. Hopkins*, 1 Plaster *v. Plaster*, 47 Ill. 290, approved in *Semrow v. Semrow*, 23 Minn. 214.

<sup>2</sup> *Bacon v. Bacon*, 43 Wis. 197; *Webster v. Webster*, 64 Wis. 438.

The terms of the decree may exclude any modification.<sup>1</sup> But it is clear that the decree cannot prohibit such change where the statute provides otherwise.<sup>2</sup> In all cases the decree for alimony may be vacated and set aside or modified as other judgments and decrees, on account of fraud and mistake.<sup>3</sup>

**§ 934. When permanent alimony will be revised.**—In those states where the decree for alimony may be revised it is held that no change will be made unless it is shown that the wife's needs or the husband's faculties have increased or diminished. The decree is *res judicata* as to all matters existing at the time it was rendered. New facts occurring since the decree must be shown.<sup>4</sup> The estoppel extends to all matters properly before the court which the parties might have litigated.<sup>5</sup>

The new facts which will influence the court in increasing or decreasing the allowance are necessarily those which affect the pecuniary condition of the parties.<sup>6</sup> The former

The same construction is given to the English statute. *Gladstone v. Gladstone*, 1 P. D. 442.

<sup>1</sup> *Hyde v. Hyde*, 4 Swab. & T. 80.

<sup>2</sup> *Campbell v. Campbell*, 37 Wis. 206; *Coad v. Coad*, 41 Wis. 23; *Guenther v. Jacobs*, 44 Wis. 354.

<sup>3</sup> *Senter v. Senter*, 70 Cal. 619; *Gray v. Gray*, 83 Mo. 106; *Speck v. Dausman*, 7 Mo. Ap. 165; *Moon v. Baum*, 58 Ind. 194. In *Perkins v. Perkins*, 12 Mich. 456, the court refused to modify a decree for alimony where the husband was not aware, when the decree was rendered, that alimony in gross was not a bar to the wife's right of dower. If the lower court had overlooked the fact that the wife retained her right of dower on divorce, it would seem to be error to refuse to modify the decree.

<sup>4</sup> *Fishli v. Fishli*, 1 Blackf. 360;

*Wilde v. Wilde*, 36 Ia. 319; *Reid v. Reid*, 74 Ia. 681; *White v. White*, 75 Ia. 218; *Strauss v. Strauss*, 14 N.Y. Supp. 671; *Semrow v. Semrow*, 23 Minn. 214; *Fisher v. Fisher*, 32 Ia. 20; *Olney v. Watts*, 43 O. St. 499; *Buckminster v. Buckminster*, 38 Vt. 248; *Perkins v. Perkins*, 12 Mich. 456; *Weld v. Weld*, 28 Minn. 33; *De Blaquier v. De Blaquier*, 3 Hag. Ec. 322; *Cox v. Cox*, 2 Ad. Ec. 276; *Vert v. Vert*, 3 S. Dak. 619, 54 N. W. 665; *Louis v. Louis*, 1 P. & M. 230.

<sup>5</sup> *Petersine v. Thomas*, 28 O. St. 596; *Harmar v. Harmar*, D. & S. 282.

<sup>6</sup> See form of decree revising alimony in *Dawson v. Dawson*, 110 Ill. 279. See form of application to modify decree for alimony in *Olney v. Watts*, 43 Ohio St. 499.

wife is no longer such, but is a mere judgment creditor of the husband; consequently her misconduct will not affect the allowance.<sup>1</sup> Her adultery will not be a cause for terminating the alimony; as she can commit no offense against a marriage which has been dissolved.<sup>2</sup> It is said that "the divorce puts the parties in the position of strangers to each other as to their moral conduct thereafter. Her claim on him under the ordinary order of alimony is merely pecuniary, not to be affected by her vice or virtue, any more than if the recurring sums for alimony were instalments upon a land purchase."<sup>3</sup> Another good reason for refusing to disturb the decree on account of the subsequent misconduct of the wife is that the allowance made by the court may have been a restitution of property which the wife had contributed to the common fund, or which was the result of their joint earnings and economy.<sup>4</sup> It is held that the wife cannot recover alimony while she is supported by a paramour; but she may recover after such support ceased.<sup>5</sup> The death of a child or the ability of the children to support themselves may be a cause for changing the allowance, as such events relieve the wife of their support.<sup>6</sup> Generally the application to change the allowance is based upon the inability of the husband to make the required payments.<sup>7</sup> It is held that an increase of the husband's property by inheritance will justify an increase of the allowance.<sup>8</sup>

<sup>1</sup> But if the divorce is from bed and board the wife still owes allegiance to the husband, and her adultery will justify the court in vacating the decree of alimony. *Severn v. Severn*, 14 Grant (U. C.), 150.

<sup>2</sup> *Forrest v. Forrest*, 3 Bosw. 661, 8 Bosw. 640, 9 Bosw. 686, 25 N. Y. 501; *Cross v. Cross*, 63 N. H. 444; *Alexander v. Alexander*, 20 D. C. 552; *Begbie v. Begbie*, 3 Halst. Ch. 98.

<sup>3</sup> *Cole v. Cole*, 35 Ill. Ap. 544. See, also, *Bradley v. Bradley*, 7 P. D. 237.

<sup>4</sup> *Cole v. Cole*, 142 Ill. 19.

<sup>5</sup> *Holt v. Holt*, 1 P. & M. 610.

<sup>6</sup> *Thurston v. Thurston*, 38 Ill. Ap. 464; *Semrow v. Semrow*, 23 Minn. 214.

<sup>7</sup> *Fisher v. Fisher*, 32 Ia. 20; *Barrett v. Barrett*, 41 N. J. Eq. 139; *Holway v. Holway*, 29 Grant Ch. 41; *Halstead v. Halstead*, 5 Duer, 659; *De Blaquiere v. De Blaquiere*, 3 Hag. Ec. 322.

<sup>8</sup> *Mildeberger v. Mildeberger*, 12 Daly, 195.

In revising a decree for alimony

Where the alimony is not in gross and does not appear to be in settlement of property rights or in lieu of dower, the court may terminate the allowance on the death of the husband.<sup>1</sup>

**§ 935. Alimony where there is no personal service.**—Where there is no personal service and the defendant does not appear, the suit is based upon constructive service—either service by publication or personal service in another state. In such case the proceeding is said to be *in rem* so far as it affects the marital *status* of the parties. The jurisdiction is over the *status* of the parties only; and so far as the decree operates upon such *status* it is valid. But so far as the decree awards alimony and costs, or the maintenance of children, it is said to be *in personam*, and void for want of personal service within the state.<sup>2</sup> It seems that under the present condition of our law the wife is without remedy where the husband leaves his property and goes to another state. She may have the marriage dissolved by a decree *in rem*, but in such action she cannot have a valid decree of alimony or any relief against his property.<sup>3</sup> If she follows her husband to obtain divorce where he resides, he can remove to another state before she can acquire a domicile and commence her suit. Under the rulings of many of our states the husband may leave his wife and property, go to another state and obtain a decree of divorce without personal service or actual notice to the wife, and such decree is a bar to her right to alimony and dower.<sup>4</sup> Where a decree for alimony was held void because rendered without personal service

the court may award a gross sum in lien of alimony in instalments, and may make such sum a lien on property which secured the former decree. *King v. Miller*, 10 Wash. 274, 38 P. 1020.

<sup>1</sup> *Lennahan v. O'Keefe*, 107 Ill. 620.

<sup>2</sup> *Bunnell v. Bunnell*, 25 Fed. 214; *Frosser v. Warner*, 47 Vt. 667;

*Lythe v. Lythe*, 48 Ind. 200; *Middleworth v. McDowell*, 49 Ind. 386; *Beard v. Beard*, 21 Ind. 321; *Kline v. Kline*, 57 Ia. 386; *Madden v. Fielding*, 19 La. An. 505; *Ellison v. Martin*, 53 Mo. 575; *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405; *Black on Judgments*, § 933.

<sup>3</sup> *Bunnell v. Bunnell*, 25 Fed. 214.

<sup>4</sup> *Gould v. Crow*, 51 Mo. 200.

upon the husband, it was suggested that if the wife "were allowed to proceed as an attaching creditor when her bill is filed, the suit might partake of the nature of a proceeding *in rem*, and a decree for alimony be enforced against the property itself."<sup>1</sup> Where a petition for divorce describes the husband's property, and asks that his conveyance to others be set aside and the property made subject to a decree for alimony, the fact that a *lis pendens* was filed will not create a lien upon the property, or bring it within the jurisdiction of the court so as to render the proceeding *in rem*.<sup>2</sup> The most satisfactory remedy is an attachment against the husband's property to satisfy the decree of alimony. Such remedy exists in some of the states.<sup>3</sup> In some states this remedy may be had under the general provisions of the code.<sup>4</sup> Where the decree for alimony is void because rendered without personal service, it is held that in a supplemental proceeding, in the nature of a creditor's bill against the husband's property, the same court may render a valid decree for alimony if the husband appears to object to the validity of the proceedings.<sup>5</sup>

**§ 936. Alimony after divorce.**—It is an open question whether alimony can be allowed after the marriage relation is dissolved by divorce. The question is clearly one of interpretation of the statute, and no aid can be derived from

<sup>1</sup> *Bunnell v. Bunnell*, 25 Fed. 214, citing on this proposition, Cooper *v. Reynolds*, 10 Wall. 308.

<sup>2</sup> *Bunnell v. Bunnell*, 25 Fed. 214.

<sup>3</sup> See statutes in *Daniels v. Lindley*, 44 Ia. 567; *Daniels v. Morris*, 54 Ia. 369; *Downs v. Flanders*, 150 Mass. 92.

<sup>4</sup> In Colorado the wife may recover alimony without divorce and in the same action have a fraudulent conveyance set aside and the real estate adjudged subject to a lien for the alimony. *Hanscom v. Hanscom* (Colo.), 39 P.

884. The code (sec. 41) provides that service by publication can only be had in "cases of attachment, foreclosure, claim and delivery, divorce or other proceedings where specific property is to be affected, or where the procedure is such as is known as a proceeding *in rem*."

<sup>5</sup> *Johnson v. Johnson*, 31 Neb. 385, 47 N. W. 1115. For direct proceeding for alimony upon personal service in another state, see *Thurston v. Thurston* (Minn.), 59 N. W. 1017.

the common law, since the power both to dissolve the marriage and grant the wife a permanent maintenance after an absolute divorce is derived from statute in all the states and in England. These statutes are similar in their phraseology, and a fair interpretation would seem to be that they contemplate an adjudication of all questions of alimony by the court which grants the divorce and at the same time. It is conceded that the court may, in a decree dissolving the marriage, reserve the power to grant alimony at a later date.<sup>1</sup> And the statute may by direct terms permit a decree for alimony after divorce, as in New Hampshire, where the court has power "to revise and modify any order made respecting alimony, and to make such new orders as may be necessary," etc.<sup>2</sup> Or the terms of the statute often indicate that the decree may be rendered "upon a decree of divorce" or "when a divorce is granted."<sup>3</sup> But where the decree does not reserve the power to grant alimony, or such power is not given by statute, it is clear that a decree of divorce without alimony is an adjudication against the right of the wife, for the right to alimony should have been determined when the divorce was granted.<sup>4</sup>

<sup>1</sup> Ambrose, *E. v. parte*, 72 Cal. 398. Permanent alimony cannot be granted until the court had determined that a divorce will be rendered. To grant alimony before the final hearing is error. Johnson *v.* Johnson (Kan.), 39 P. 725; Woods *v.* Waddle, 44 O. St. 449; Cooledge *v.* Cooledge, 1 Barb. Ch. 77; Lake *v.* King, 16 Nev. 215; Galusha *v.* Galusha, 138 N. Y. 272, 33 N. E. 1062. But see *contra*, Cullen *v.* Cullen, 55 N. Y. Supr. 346.

<sup>2</sup> Ela *v.* Ela, 63 N. H. 116; Sheafe *v.* Sheafe, 36 N. H. 155; Sheafe *v.* Laighton, 36 N. H. 240; Folsom *v.* Folsom, 55 N. H. 78.

<sup>3</sup> See Prescott *v.* Prescott, 59 Me. 146.

<sup>4</sup> Downey *v.* Downey (Ala.), 13 So. 412.

Mr. Bishop holds that alimony may be granted after a decree of divorce has been rendered and the term of court has closed. "Divorce litigation," said he, "is in its nature exceptional, rendering it, as to alimony, or the support of the wife, never at an end during the joint lives of the parties. And such was the law which traveled to this country from England to become common law here. For the course in the ecclesiastical courts, followed afterward by the divorce court, was not only to receive applications to vary the alimony at times and terms of court however

If the decree expressly reserves the question of alimony for further consideration or for further order or decree, it is clear that the decree is not an adjudication of the question. Application for permanent alimony may be made within any reasonable time after the divorce is granted.<sup>1</sup>

The power to revise or modify a judgment relating to alimony would seem to imply the power to grant a new hearing, and to make a new decree in conformity to the changed condition of the parties. If the decree of divorce fixes some amount of alimony, that amount may be changed. If the decree was silent as to alimony, further evidence may be heard, and the decree may be revised. The power to revise exists in either case. "The power of the court to award

remote after the granting of the divorce; but if the question of alimony was not passed upon before the divorce sentence was entered and the court adjourned, to entertain in the same cause an original petition for it at any subsequent time or term. In accordance with which view, it has been in some of our courts laid down that though the common practice is to ask for divorce and alimony in one bill, and have an award of both at one time, a party need not proceed thus; but if the question of alimony is not determined in the divorce suit, the wife may afterward sue for it by separate bill, either in the same court or any other of competent jurisdiction," — citing the following authorities, some of which do not sustain him: *Shotwell v. Shotwell*, Sm. & M. Ch. 51; *Lawson v. Shotwell*, 27 Miss. 630; *Crugom v. Crugom*, 64 Wis. 253; also *Lyon v. Lyon*, 21 Conn. 185; *McKarracher v. McKarracher*, 3 Yeates, 56; *Jordan v. Jordan*, 53 Mich. 550; *Ellis v. Ellis*, 13 Neb. 91.

No distinction is made by him between the two kinds of divorce. The common law applies to permanent alimony after a decree *a mensa*, but it seems that it does not apply to the permanent maintenance rendered after the statutory divorce from the bonds of matrimony. See *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Romaine v. Chauncey*, 129 N. Y. 566.

<sup>1</sup> A decree of absolute divorce reserved the question of permanent alimony "for further order or decree herein," and the wife made no application for alimony until after the death of the husband, some five years after the decree of divorce was rendered. The executor under the will resisted the wife's application for alimony out of the estate. It was held that the wife could recover alimony under such circumstances, as the subsequent death of the husband would not oust the court of jurisdiction to make such order. *Seilby v. Ingham* (Mich.), 63 N. W. 528.

alimony to a wife in a divorce suit does not depend on the fact that some alimony was awarded at the time the judgment for divorce was granted. The fact that no alimony was then awarded by the court is no bar to its being afterward awarded."<sup>1</sup> But where the wife has applied for alimony, and the decree of divorce is silent as to her right to alimony, the presumption is that her application was refused, and the decree is an adjudication that she has no right to alimony.<sup>2</sup> Such decree cannot be modified by allowing alimony.

The English divorce act<sup>3</sup> contains a provision similar to the provisions of our statutes relating to alimony after an absolute divorce. It provides that "the court may, if it shall think fit, *on any such decree* (of absolute divorce) order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money," etc. Under this statute it is held that the court may make an order for permanent maintenance after an absolute divorce has been pronounced, if the application is made without unreasonable delay.<sup>4</sup>

The decree of divorce, whether with or without alimony,

<sup>1</sup>Cook *v.* Cook, 56 Wis. 195. The Wisconsin statute provides that "after a judgment providing for alimony, or other allowance for the wife or children, . . . the court may from time to time, on the petition of either of the parties, revise and alter such judgment, . . . and may make any judgment respecting any of the said matters which such court might have made in the original action." It is held that this provision authorizes the granting of alimony where a divorce was obtained in another state. See dissenting opinion of Taylor, J., in Cook *v.* Cook, 56 Wis. 195. And where the husband obtained a decree which was

silent as to alimony, it was held that the court might award it on the wife's application five years afterward. Crugom *v.* Crugom, 64 Wis. 253.

For Missouri statute relating to revision, see Anderson *v.* Anderson, 55 Mo. Ap. 268.

<sup>2</sup>Howell *v.* Howell, 104 Cal. 45, 37 P. 770.

<sup>3</sup>20 and 21 Vict.

<sup>4</sup>Bradley *v.* Bradley, 3 P. D. 47, overruling Vicars *v.* Vicars, 29 L. J. (P. & M.) 20. See, also, Winston *v.* Winston, 2 Swab. & T. 246; Charles *v.* Charles, 1 P. & M. 260; Sidney *v.* Sidney, 1 P. & M. 78, overruled 36 L. J. (P. & M.) 74; Covell *v.* Covell, 2 P. & M. 411.

should be governed by the ordinary rules of law which are applied to other judgments. If the wife appeared in the action and a decree was rendered without alimony, the law will presume that every question which might have been involved in the action was litigated, and in effect a decree without alimony is the same as a decree denying alimony.<sup>1</sup> Such decree may be revised by showing that it was obtained by fraud, or that some mistake was made, or that the husband concealed his property.<sup>2</sup> Under the principle of *res judicata* it would seem that if the wife had no opportunity to be heard, and could make no application for alimony, and the court did not pass upon the question, or had no jurisdiction to award alimony, the *ex parte* decree of divorce should not be a bar to her subsequent proceedings for alimony.<sup>3</sup> It may be urged that the decree of divorce dissolved the marriage relation and there is no longer a husband and wife and no liability on the part of the man to support his former wife. But in answer to this it may be said that when a man obtains a divorce he thereupon becomes liable for permanent maintenance of his former wife as fixed by the court. If the court granting the divorce does not fix the amount of his liability, has he escaped all liability? Are the rights of the wife to be determined without her 'day in court?' What remedy has she if an *ex parte* divorce is a bar to a subsequent application for alimony?<sup>4</sup>

<sup>1</sup> *Kamp v. Kamp*, 59 N. Y. 212; *Erkenbach v. Erkenbach*, 96 N. Y. 456; *Wilde v. Wilde*, 36 Ia. 319; *Jordan v. Jordan*, 53 Mich. 550; *Lawson v. Shotwell*, 27 Miss. 630, overruling *Shotwell v. Shotwell*, *v. Henderson*, 64 Me. 419. *Sm. & M. Ch.* 51.

<sup>2</sup> *Wilde v. Wilde*, 36 Ia. 319; *Blythe v. Blythe*, 25 Ia. 266. But see, *contra*, *Johnson v. Johnson*, 12 Daly, 232, 65 How. Pr. 517. In Maine it is held that where the husband obtained a divorce without actual notice to the wife in time to permit her to defend, and the decree made no provision for alimony, the wife could obtain relief by an original suit, but not by proceeding for review. *Henderson v. Henderson*, 64 Me. 419.

<sup>3</sup> See *contra*, *Roe v. Roe*, 52 Kan. 724, 35 P. 808.

<sup>4</sup> The statute of Ohio permits her to obtain alimony although the parties are divorced by an *ex parte* decree. In *Cox v. Cox*, 19 O. St. 502, the wife was allowed a decree for alimony although the husband

The *ex parte* decree of divorce is in no sense an adjudication of her right to alimony. The court had no jurisdiction over the wife or her property rights. The jurisdiction of the court was limited to the *res*, the *status* of the husband, and so far is valid as a dissolution of the marriage. As said by the Alabama court, "it certainly cannot affect the rights of the complainant, except her right in the husband as a husband. . . . But it does not settle her right to alimony; it does not settle her right to dower in his lands, and her statutory right to distribution of his property in this state, in the event she should survive him, nor any other interest of a pecuniary character she may have against him."<sup>1</sup>

In conformity with the above doctrine it is held in Minnesota that "The question of alimony is not *res adjudicata* by reason of a judgment of divorce in the proceeding *in rem*. . . . That judgment establishes nothing except that the marriage relation has been condemned and destroyed by a judgment of divorce; all other questions are *res nova*."<sup>2</sup>

had obtained a divorce in Indiana. Where a wife obtained an *ex parte* divorce *a vinculo* in Tennessee upon constructive service, and her application for alimony was dismissed without prejudice to enable her to sue for it elsewhere, it was held that she might recover alimony in a subsequent action in Ohio. Woods *v.* Waddle, 44 O. St. 449. It is held that an *ex parte* decree while it changes the *status* of the parties does not affect their property rights. Doer *v.* Forsythe, 50 O. St. 726. In Iowa it is admitted that an *ex parte* divorce will not bar an application for alimony; but the alimony granted must be with reference to the husband's property at the time the decree was rendered. Property sub-

sequently acquired should not be considered. Van Orsdal *v.* Van Orsdal, 67 Ia. 35.

<sup>1</sup> Turner *v.* Turner, 44 Ala. 437, citing Webster *v.* Reid, 11 How. (U. S.) 437, 460; Nations *v.* Johnson, 24 How. (U. S.) 195; Boswell's Lessee *v.* Otis, 9 How. (U. S.) 336; Mills *v.* Duryee, 7 Cranch, 481; D'Arcey *v.* Ketchum, 11 How. (U. S.) 165; McElmoyle *v.* Cohen, 13 Pet. 312, 330.

<sup>2</sup> Thurston *v.* Thurston (Minn.), 59 N. W. 1017, approving Turner *v.* Turner, 44 Ala. 437. In this case the husband, in contemplation of a suit for divorce, induced the wife to join with him in conveying his real estate to one of the defendants to be held in trust for the husband and thus defeat the wife's claim for

Where the husband leaves the wife and goes to another state, he cannot escape his liability for alimony by obtaining an *ex parte* decree of divorce on constructive service. To give the decree this effect would work a fraud upon the pecuniary rights of the parties. The wife may, within a reasonable time, recover alimony in a subsequent proceeding without vacating the *ex parte* decree.<sup>1</sup> She may bring the action in the state where the husband obtained the decree.<sup>2</sup> Or she may recover the alimony in the state where she resides.<sup>3</sup>

The doctrine that an *ex parte* decree is not a bar to a subsequent proceeding for alimony is denied in Kansas. The wife brought an action for divorce in Kansas, but before she obtained a decree the husband obtained a valid decree of divorce in Colorado on service by publication. It was held that this decree was a final adjudication not only of the *status* of the parties but also of the property rights of the wife.<sup>4</sup> The doctrine of *res adjudicata* could not make such decree final as to property rights, for the reason that such rights could not have been litigated in the proceeding *in rem* in Colorado. That action could proceed no farther than to fix the *status* of the husband.

alimony. The defendant pleaded a decree of divorce obtained by the husband in Washington, and on the trial objected to the jurisdiction of the court to grant alimony because the personal service on the husband in Washington was, in effect, only constructive, and not justifying a decree *in personam*. But it was held that the decree was not a bar to an action for alimony, and the defect of parties defendant was waived by failure to raise the objection before trial.

<sup>1</sup> *Cochran v. Cochran* (Neb.), 60 N. W. 942.

<sup>2</sup> *Id.*; *Graves v. Graves*, 36 Ia. 310.

<sup>3</sup> *Turner v. Turner*, 44 Ala. 437;

*Thurston v. Thurston* (Minn.), 59 N. W. 1017. Under the peculiar statute of Ohio, when such alimony is granted, the allowance is based upon the value of the husband's property at the time of the wife's application, and not at the time he obtained a decree. *Cox v. Cox*, 20 O. St. 439.

<sup>4</sup> *Roe v. Roe*, 52 Kan. 774, 55 P. 808. The decision is influenced by the delay of the wife and also by the presumption that the laws of Colorado are the same as Kansas, which provide that a decree of divorce shall be a final adjudication of property rights.

The fact that the relation of husband and wife no longer exists will not prevent the action for alimony. A legislative divorce dissolves the marriage but does not bar the action for alimony.<sup>1</sup> This is denied, however, because it is said that alimony is always an incident of divorce and cannot be granted on a subsequent application.<sup>2</sup> It is now held in most of the states that the wife may recover alimony without divorce.<sup>3</sup>

**§ 937. When alimony is exempt.**—When the decree for alimony is payable in instalments, and is not a division of the property or a decree for a gross sum, it is intended that the alimony shall be allowed to the wife for her support. During the marriage the husband is bound to support the wife, and when the marriage is dissolved by divorce the husband is not relieved from such obligation, but it is continued by the decree for alimony. Such decree is not strictly a debt, but is a continuing duty of support, the terms of which are expressed in the decree.<sup>4</sup> It has been held that this special fund for the wife's support is her own separate property, and is subject to execution and garnishment as other property. The reason assigned was that at common law all the debtor's property, except necessary wearing apparel, might be taken to pay the claims of creditors, and that all exceptions to this general rule must be created by statute. Alimony, or the separate maintenance of a married woman, is not exempt by statute, and therefore may be applied to the payment of judgments against the wife.<sup>5</sup> While it may

<sup>1</sup> *Richardson v. Wilson*, 8 Yerg. 44 Ia. 567; *Burr v. Burr*, 7 Hill, 207; *White v. Bates* (Tenn.), 15 S. W. 651.

<sup>2</sup> *Bowman v. Worthington*, 24 Ark. 522.

<sup>3</sup> See reasoning in *Cochran v. Cochran*, *supra*.

<sup>4</sup> *Jordan v. Westerman*, 62 Mich. 170; *Guenther v. Jacobs*, 44 Wis. 354; *Crain v. Cavana*, 62 Barb. 109; *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Daniels v. Lindley*,

<sup>5</sup> *Stevenson v. Stevenson*, 34 Hun, 157. The separate maintenance in this case was granted upon a decree of divorce "from bed and board forever," and it does not appear that the judgments against the wife were for necessaries. The court also held that her alimony was not exempt as property held in trust for the wife.

be true that alimony is not exempt by statute, this decision is clearly wrong, as it overlooked other reasons which require that the separate maintenance of the wife be held exempt from her creditors. One reason for holding such alimony exempt is that public policy requires that the fund for her support should be applied to that specific purpose; otherwise she may become dependent upon public support.<sup>1</sup> This fund is in some respects like the salary of certain officers of the army and navy, which are held exempt on the ground of public policy in order that they may receive the support necessary to render them capable to perform their duties.<sup>2</sup> And the fund is protected from her creditors by the same public policy which exempts policies of insurance in favor of the wife on the life of the husband.<sup>3</sup> Another sufficient reason for holding the alimony exempt is that such fund is created by equity for a special purpose, and is therefore entitled to the protection of equity against the claims of general creditors.<sup>4</sup> It follows, therefore, that as such alimony is exempt on the ground of public policy as a special fund for the support of the wife, if a tradesman sells the wife necessaries for her support his claim is not within the reason of the rule, but may be satisfied from such special fund.<sup>5</sup>

The special character of alimony renders it exempt from any set-off pleaded by the husband unless it be a claim for necessaries. He cannot purchase a judgment or pay a judgment as surety, and have the same declared a set-off against the instalments of alimony then due.<sup>6</sup>

It is doubtful whether all kinds of alimony have the exemption which is conceded to alimony payable in instalments. Where the allowance is in fact a restoration to the

<sup>1</sup> *Romaine v. Chauncey*, 60 Hun, 477, disapproving *Stevenson v. Stevenson*, 34 Hun, 157.

<sup>3</sup> *Romaine v. Chauncey*, 129 N. Y. 566.

<sup>4</sup> *Id.*

<sup>2</sup> *Id.; In re Robinson*, 27 Ch. D. 160; *Reiffenstein v. Hooper*, 36 U. C. Q. B. 295.

<sup>5</sup> This point is not adjudicated. The doctrine is asserted in *Romaine v. Chauncey*, 60 Hun, 477.

<sup>6</sup> *Locke v. Locke*, 71 Hun, 363.

wife of her property, or a division of property acquired by joint effort, or a gross sum in lieu of alimony, the allowance in such case is property that vests at once in the wife, and she may assign and dispose of the same as her separate property. Such allowances are not strictly for the maintenance of the wife, are not special funds subject to the revision and control of the courts, and are not therefore within the reasons of the above rule.<sup>1</sup>

**§ 938. The wife as a creditor of the husband.**—The wife is a special creditor of the husband. Public policy requires that he should support her in order that she may not become dependent upon the state. His obligation to support is a paramount duty and a prior claim upon his resources. A discharge in bankruptcy does not, therefore, relieve him from the payment of alimony.<sup>2</sup> The claims of a creditor are not prior to those of the wife unless they existed before her suit for alimony, and can be satisfied out of property not exempt.<sup>3</sup> When the husband makes an assignment she does not *pro rata* with other creditors.<sup>4</sup> The public policy which protects the homestead and the earnings of the husband from the avarice of the ordinary creditor does not exempt them from the special claims of the wife.<sup>5</sup> Her

<sup>1</sup> See *Kempster v. Evans*, 81 Wis. 247, 51 N. W. 327.

<sup>2</sup> *Ex parte Fryer*, 17 Q. B. 718; *Ex parte Otway*, 58 L. T. (N. S.) 885; *Stones v. Cooke*, 7 Sim. 321; *Prescott v. Prescott*, 20 L. T. (N. S.) 331; *Newhouse v. C.*, 5 Whart. 82; *Shine v. Shine*, 1893 Probate, 289; *Linton v. Linton*, 15 Q. B. D. 289; *Dickens v. Dickens*, 20 L. J. Mat. Cas. 183, 2 Swab. & T. 645; *In re Henderson*, 20 Q. B. D. 509. But see *Beach v. Beach*, 29 Hun, 181; Texas' Case, 1 Ashm. 175.

<sup>3</sup> *McGee v. McGee*, 2 Sneed, 221.

<sup>4</sup> *Abraham v. Abraham*, 19 Ont. 256.

<sup>5</sup> *Bates v. Bates*, 74 Ga. 105; *Mahoney v. Mahoney* (Minn.), 61 N. W. 334; *Menzie v. Anderson*, 65 Ind. 239; *Keyes v. Scanlon*, 63 Wis. 345; *Luthe v. Luthe*, 12 Colo. 421; *Barker v. Dayton*, 28 Wis. 367; *In re Spencer*, 82 Cal. 110; *Wetmore v. Wetmore*, 29 N. Y. Supp. 440; s. c., 8 Misc. 51; *McGrady v. McGrady*, 48 Mo. Ap. 668. See *contra*, as to homestead, *Byers v. Byers*, 21 Ia. 268; *Biffle v. Pullman*, 114 Mo. 50, 21 S. W. 450; *Dent v. Dent*, 1 P. & M. 366. But see *Sansom v. Sansom*, 4 P. D. 69; *Birch v. Birch*, 8 P. D. 163.

claim may be secured by the attachment of the husband's property.<sup>1</sup>

The wife as a special creditor of the husband is within the protection of the statute against fraudulent conveyances and may proceed according to its provisions.<sup>2</sup> On a proper showing of the fraud, the conveyance will be set aside and the property of the husband will be declared subject to the decree for maintenance or alimony.<sup>3</sup> A chattel mortgage may be set aside when given to defeat a decree of alimony, and personal property may be made subject to a lien for alimony.<sup>4</sup> The conveyance will be sustained as in other cases,

<sup>1</sup>See statutes in *Daniels v. Lindley*, 44 Ia. 567; *Daniels v. Morris*, 54 Ia. 369; *Twing v. O'Mera*, 59 Ia. 326; *Downs v. Flanders*, 150 Mass. 92; *Sewall v. Sewall*, 139 Mass. 157; *Sewall v. Sewall*, 130 Mass. 201; *North v. North*, 39 Mich. 67; *Ainsworth v. Ainsworth*, 37 Ga. 627; *Farr v. Buckner*, 32 Ind. 382; *Becknell v. Becknell*, 110 Ind. 42; *Harshberger v. Harshberger*, 26 Ia. 503; *Keller v. Keller* (Ind.), 38 N. E. 337. The court may order funds held in trust for the husband paid to the wife. *Thompson v. Thompson*, 52 Hun, 456. The husband's wages are subject to garnishment. *Bates v. Bates*, 74 Ga. 105.

<sup>2</sup> *Livermore v. Boutelle*, 77 Mass. (11 Gray), 217; *Chase v. Chase*, 105 Mass. 385; *Bailey v. Bailey*, 61 Me. 361; *Plunkett v. Plunkett*, 114 Ind. 484; *Wetmore v. Wetmore*, 5 Or. 469; *Lott v. Kaiser*, 61 Tex. 665; *Morrison v. Morrison*, 49 N. H. 69; *Turner v. Turner*, 44 Ala. 438; *Boils v. Boils*, 41 Tenn. (1 Coldw.) 284; *Brooks v. Caughran*, 40 Tenn. 464; *Bouslough v. Bouslough*, 68 Pa. 495; *Carithers v. Venable*, 52 Ga. 389; *Feighley v. Feighley*, 7 Md.

538; *Frakes v. Brown*, 2 Blackf. 295.

<sup>3</sup> *Damon v. Damon*, 28 Wis. 510; *Draper v. Draper*, 68 Ill. 17; *Twell v. Twell*, 6 Mont. 19, and cases cited; *Barker v. Dayton*, 28 Wis. 368; *Varney v. Varney*, 54 Wis. 422; *Foster v. Foster*, 56 Vt. 540; *Boog v. Boog*, 78 Ia. 524; *Pickett v. Garrison*, 76 Ia. 347; *Springfield Ins. Co. v. Peck*, 102 Ill. 265; *Atkins v. Atkins*, 18 Neb. 474; *Barrett v. Barrett*, 5 Or. 411; *Odom v. Odom*, 36 Ga. 286; *Janvrin v. Janvrin*, 60 N. H. 169; *Janvrin v. Curtis*, 62 N. H. 312; *Tyler v. Tyler*, 126 Ill. 525; *Foster v. Foster*, 56 Vt. 540; *Green v. Adams*, 59 Vt. 602, 10 A. 742; *Johnson v. Johnson* (Ky.), 2 S. W. 487; *Gregory v. Fillbeck*, 12 Col. 379; *Reeg v. Burnham*, 55 Mich. 39; *Way v. Way*, 67 Wis. 662; *Jenny v. Jenny*, 24 Vt. 324; *Jiggetts v. Jiggetts*, 40 Miss. 718; *Nix v. Nix*, 57 Tenn. (10 Heisk.) 546; *Dugan v. Trisler*, 69 Ind. 553; *Stuart v. Stuart*, 123 Mass. 370; *Dutton v. Jackson*, 2 Del. Ch. 86; *Prouty v. Prouty*, 4 Wash. 174; *Scott v. Magloughlin*, 133 Ill. 33, 24 N. E. 1030.

<sup>4</sup> *Gardenhire v. Gardenhire* (Okl.), 37 P. 813.

if made to one who purchases in good faith and without intent to defraud the wife.<sup>1</sup>

A conveyance of real estate by both husband and wife to a minor child several years before the divorce suit was commenced will be sustained and will not be set aside to allow the wife alimony.<sup>2</sup> The wife may, in the suit for divorce, restrain him from conveying his property to defeat the order for alimony which may be rendered.<sup>3</sup> Such injunction must continue until the further order of the court, and should terminate when the order for alimony is entered and provisions are made to secure its payment.<sup>4</sup> When the husband leaves the state to avoid the payment of alimony the court may apply the income of a trust fund payable to him to the payment of the decree.<sup>5</sup> Where the petition specifically describes the husband's real estate, the proceedings are constructive notice to others of the wife's claim.<sup>6</sup> But in an ordinary suit for divorce and alimony the doctrine of *lis*

<sup>1</sup> Barrow *v.* Barrow, 18 Ind. 345; Metzler *v.* Metzler, 99 Ind. 384; Halleman *v.* Halleman, 65 Ga. 476; Lamar *v.* Jennings, 69 Ga. 392; Fields *v.* Fields, 2 Wash. 441, 27 P. 267; Faris *v.* Goins, 18 S. W. 2.

<sup>2</sup> Bruner *v.* Bruner, 115 Ill. 40.

<sup>3</sup> Busenbark *v.* Busenbark, 33 Kan. 572; Boils *v.* Boils, 41 Tenn. (1 Coldw.) 284; Springfield Inv. Co. *v.* Peck, 102 Ill. 265; Remington *v.* Supr. Court of San Francisco, 69 Cal. 633, 11 P. 252; Frakes *v.* Brown, 2 Blackf. 294; Gray Bros. *v.* Gray, 65 Ga. 193; Wharton *v.* Wharton, 57 Ia. 696; Wilson *v.* Wilson, Wright (Ohio), 129; Edwards *v.* Edwards, Wright, 308; Questel *v.* Questel, Wright, 492; Johnson *v.* Johnson, Wright, 454; Bascomb *v.* Bascomb, Wright, 632; Ricketts *v.* Ricketts, 4 Gill, 105; Anshutz *v.* Anshutz, 16 N. J. Eq. 162; Johnson

*v.* Johnson, 59 Ga. 613; Rose *v.* Rose, 11 Paige Ch. 166; Vanzant *v.* Vanzant, 23 Ill. 536. See *contra*, Newton *v.* Newton, 11 P. D. 11; Fein *v.* Fein, 3 Wyoming, 161, 13 P. 79; Vincent *v.* Parker, 7 Paige, 65; Norris *v.* Norris, 27 Ala. 519; Uhl *v.* Irwin (Okl.), 41 P. 376; Irwin *v.* Irwin (Okl.), 37 P. 548.

<sup>4</sup> Draper *v.* Draper, 68 Ill. 17; Erissman *v.* Erissman, 25 Ill. 136.

<sup>5</sup> Wetmore *v.* Wetmore, 8 Misc. 51.

<sup>6</sup> Sapp *v.* Wightman, 103 Ill. 150; Tolerton *v.* Willard, 30 O. St. 579; Daniels *v.* Hodges, 87 N. C. 97; Wilkinson *v.* Elliott, 43 Kan. 590, 23 P. 614; Gilmore *v.* Gilmore, 5 Jones' Eq. 284; Isler *v.* Brown, 66 N. C. 556; Tabb *v.* Williams, 4 Jones' Eq. 352; Berg *v.* Ingalls, 79 Tex. 522, 15 S. W. 579; Almond *v.* Almond, 4 Randolph (Va.), 662; Moore *v.* Moore, 59 Tex. 54.

*pendens* does not apply.<sup>1</sup> The decree for alimony, however, is a judgment, and is considered as having the same effect as other judgments for the payment of money.<sup>2</sup> Where judgments are declared by statute to be a lien upon the real estate of the defendant from the day of the rendition of such judgment, or from the first day of the term in which the judgment is rendered, the decree for alimony will become a lien upon the same date as other decrees.<sup>3</sup> The wife is, therefore, entitled to an execution against lands conveyed by the husband after the decree became a lien, although the pleadings and decree contain no reference to any specific property.<sup>4</sup>

**§ 939. Attachment for contempt.**—The ecclesiastical court did not enforce its orders by imprisonment for contempt; but when a husband refused to pay the alimony awarded he was excommunicated. In 1813 excommunication as a civil process was forbidden, and it was provided that where a party was in contempt a writ *de contumace capiendo* could be obtained in the court of chancery. But this provision is too recent to be a part of our common law. Later the divorce court was empowered to enforce its orders by proceedings in conformity to the chancery practice.<sup>5</sup> American courts having jurisdiction of actions for

<sup>1</sup> Powell *v.* Campbell, 20 Nev. 232, 20 P. 156; Brightman *v.* Brightman, 1 R. I. 112; Spencer *v.* Spencer, 9 R. I. 150; Hamlin *v.* Bevins, 7 Ohio (1st part), 161; O'Brien *v.* Putney, 55 Ia. 292; Scott *v.* Rogers, 77 Ia. 482, 42 N. W. 377; Houston *v.* Timmerman, 17 Or. 499, 21 P. 1037. See indefinite description in Venable *v.* Craig, 44 Ga. 437.

<sup>2</sup> Frakes *v.* Brown, 2 Blackf. 295.

<sup>3</sup> Keyes *v.* Scanlan, 63 Wis. 345, 23 N. W. 570.

<sup>4</sup> Conrad *v.* Everich, 50 O. St. 476, criticising Olin *v.* Hungerford, 10 Ohio, 268. The statutes of Ohio

provide in effect that the mode of proceedings for divorce shall be as in chancery, and that "decrees in chancery shall, from the time of their being pronounced, have the force, operation and effect of a judgment at law."

<sup>5</sup> See *Ex parte Holden*, 13 C. B. (N. S.) 641; Greenhill *v.* Greenhill, 1 Curt. Ec. 462; Hamerton *v.* Hamerton, 1 Hag. Ec. 23. As to English practice, see De Lossy *v.* De Lossy, 15 P. D. 115; Alexander *v.* Alexander, 2 Swab. & T. 385; Nicholls *v.* Nicholls, 2 Swab. & T. 637; Thomas *v.* Thomas, 2 Swab. & T. 64;

divorce have also the inherent power to enforce their orders by contempt proceedings, or by such other adequate means as may be justified by the general jurisdiction of the court, and its procedure.<sup>1</sup> Without such power our courts could not maintain their authority and many important functions would be paralyzed.

It has frequently been insisted that a decree for alimony is in fact a debt, and therefore payment should not be enforced by attachment for contempt where the constitution prohibits imprisonment for debt. But it is uniformly held, and such is the true doctrine, that the decree for alimony is an order of the court to the husband compelling him to support his wife by paying certain sums, and thus perform a public as well as marital duty. Such decree is something more than an ordinary debt or judgment for money. It is a personal order to the husband, similar to an order of the court to one of its officers or to an attorney. The imprisonment is not alone to enforce the payment of money but to punish the disobedience of a party; and the order is not, therefore, a debt, within the meaning of the constitution.<sup>2</sup> It is sometimes held that where the statute provides for execution and other processes for the collection of alimony, that imprisonment for contempt cannot be resorted to as an additional remedy.<sup>3</sup> But the correct inter-

Davies *v.* Davies, 2 Swab. & T. 487; Carlton *v.* Carlton, 44 Ga. 216; Bremner *v.* Bremner, 3 Swab. & T. 378; Busby *v.* Busby, 2 Swab. & T. 383; Dickens *v.* Dickens, 2 Swab. & T. 521; Pearson *v.* Pearson, 2 Swab. & T. 546; Hepworth *v.* Hepworth, 2 Swab. & T. 414; Holland *v.* Holland, 4 Swab. & T. 78; Parr *v.* Parr, 4 Swab. & T. 229; Watts *v.* Watts, 4 Swab. & T. 274.

<sup>1</sup> Andrews *v.* Andrews, 62 Vt. 495, 28 A. 17; Curtis *v.* Gordon, 62 Vt. 340, 20 A. 820.

<sup>2</sup> *Ex parte* Perkins, 18 Cal. 60; Murray *v.* Murray, 35 Fed. 496;

Wightman *v.* Wightman, 45 Ill. 167; Ballard *v.* Caperton, 2 Metc. (Ky.) 412; Lewis *v.* Lewis, 80 Ga. 706; Grimm *v.* Grimm, 1 E. D. Smith, 100; Pain *v.* Pain, 80 N. C. 322; Sheafe *v.* Sheafe, 36 N. H. 155; Andrew *v.* Andrew, 62 Vt. 495, 20 A. 817. See opinion by Cooley, J., Stellar *v.* Stellar, 25 Mich. 159. But see *contra*, Coughlin *v.* Ehlert, 39 Mo. 285. Effect of this provision in contempt cases, see Blake *v.* P., 80 Ill. 11.

<sup>3</sup> Lansing *v.* Lansing, 4 Lans. 377,

pretation is that the statute conferring additional remedies did not deprive the courts of their inherent power to enforce such orders.<sup>1</sup> In Illinois it is held that where the payments are secured the husband is not liable to attachment for contempt, such proceeding being harsh and unnecessary.<sup>2</sup> In New York the moving party is required to show, not only that the husband has refused to comply with the order, but also that the payment cannot be enforced by execution or sequestration, or a resort to the securities.<sup>3</sup> And the order committing for contempt for the non-payment of alimony must be an adjudication that the refusal to make the payments demanded defeated or prejudiced the rights of the other party, and it must further appear that the payments cannot otherwise be enforced.<sup>4</sup> The husband is guilty of contempt not only for refusal to pay temporary alimony and permanent maintenance, but also attorney fees,<sup>5</sup> fees of referee and stenographer,<sup>6</sup> and the cost of commitment, but not the ordinary costs of the suit for divorce.<sup>7</sup>

In those states where it is held that a separate suit for maintenance may be maintained without seeking a divorce, the decree may be enforced by contempt proceedings. The

reversing 41 How. Pr. 248; *Gane v. Isaacs*, 10 Daly, 306; *Rahl v. Rahl*, 14 Wk. Dig. 560; *Ryer v. Ryer*, 67 How. Pr. 369.  
13 J. & S. 355, overruled in 8 Ab. N. C. 174; *Baker v. Baker*, 23 Hun, 356. See statute in *Segear v. Segear*, 23 Neb. 306; *In re Fanning*, 40 Minn. 4; *North v. North*, 39 Mich. 67.

<sup>1</sup> *Staples v. Staples* (Wis.), 58 N. W. 1036; *Strobridge v. Strobridge*, 21 Hun, 288; *Park v. Park*, 18 Hun, 466; s. c., 80 N. Y. 156.

<sup>2</sup> *Andrews v. Andrews*, 69 Ill. 609. See *contra*, *McSherry v. McSherry*, 49 Ill. Ap. 90.

<sup>3</sup> See construction of code in *Cockefair v. Cockefair*, 23 Ab. N. C. 219, 7 N. Y. Supp. 170; *Sandford v. Sandford*, 44 Hun, 363; *Isaacs v. Isaacs*, 61 How. Pr. 369; *Isaacs v.*

*Whitney v. Whitney*, 11 N. Y. Supp. 583, 19 Civil Pro. 265; *In re Sims*, 11 N. Y. Supp. 211, 57 Hun, 433; *Mendel v. Mendel*, 4 N. Y. St. Rep. 556; *Mahon v. Mahon*, 18 J. & S. 92; *In re Swenarton*, 40 Hun, 41.

<sup>5</sup> *Ward v. Ward*, 6 Ab. (N. S.) 79. See *contra*, *Branth v. Branth*, 36 N. Y. St. 628.

<sup>6</sup> *Mahon v. Mahon*, 5 Civil Pro. 58. See, also, *People v. Grant*, 18 Civil Pro. 183.

<sup>7</sup> *Weil v. Weil*, 18 Civil Pro. 241, 10 N. Y. Supp. 627; *Jacquin v. Jacquin*, 36 Hun, 378; *Rodman v. Rodman*, 24 Wk. Digest, 473.

inherent power of the court in such cases is the same as if the proceedings were for divorce.<sup>1</sup> The exercise of such power does not violate the provision of the constitution of the United States, that no person shall be deprived of his liberty without due process of law.<sup>2</sup>

Attachment for contempt is a harsh and severe remedy. It should be confined to cases where the refusal of the husband is contumacious, showing a resolve to disobey or defeat the order of the court.<sup>3</sup> The imprisonment should not be ordered when it appears that the husband has failed to comply with the order on account of his inability from business misfortunes, lack of health or employment, or other extenuating circumstances.<sup>4</sup> The doctrine of *res judicata* should apply to the question of the husband's ability to comply with the order. He should not be heard on this question at every stage of the case. When the court, after hearing the evidence, fixes the amount of the alimony, the order is final, and the husband's remedy is by appeal. If his inability is due to subsequent events his remedy is by motion to reduce the amount, and by appeal from this order if not satisfactory.<sup>5</sup> It has been held that, on motion to show cause why he should not be committed for failing to comply with the order of the court, the husband cannot show, in opposition to the motion, that his pecuniary circumstances are such as to render him unable to make the required payments.<sup>6</sup> But it would seem that any facts occurring after the date of the order for alimony might be shown, since

<sup>1</sup> *Murray v. Murray*, 84 Ala. 363, *Wallen v. Wallen*, 11 Pa. Co. Ct. 41. See, also, *West v. West*, 11 Pa. 4 So. 239.

<sup>2</sup> *Murray v. Murray*, 35 Fed. 496, Co. Ct. 254; *In re Clark*, 20 Hun, following above. 551; *Gerard v. Gerard*, 2 Barb. Ch.

<sup>3</sup> *Staples v. Staples* (Wis.), 58 N. W. 1036; *Slade v. Slade*, 106 Mass. 499. 73; *Pritchard v. Pritchard*, 4 Ab. N. Cas. 298; *Ryckman v. Ryckman*, 34 Hun, 235.

<sup>4</sup> *Noland v. Noland*, 29 Hun, 680; <sup>5</sup> *State v. Dist. Ct.*, 14 Mont. 396, *Holtham v. Holtham*, 26 N. Y. Supp. 36 P. 757.

762; *Spencer v. Lawler*, 79 Cal. 215; <sup>6</sup> *Strobridge v. Strobridge*, 21 *Galland v. Galland*, 44 Cal. 475; Hun, 288.

such facts were not before the court at that time, and may be such as will excuse the husband from further payments.<sup>1</sup>

The proceeding is *quasi-criminal*, and due notice of the award must be given and a demand made upon the husband.<sup>2</sup> Such demand and notice may be unnecessary under some circumstances, as where the husband is in court, or has notice of the order and refuses to comply with it.<sup>3</sup> The notice should be served upon the husband, but in some cases notice to his attorney will be sufficient.<sup>4</sup> The husband must be allowed a hearing on the order to show cause and allowed to show any circumstance which tends to excuse him or presents a ground for reducing the amount of alimony. The order of the court refusing to reduce the amount of alimony and committing the defendant to prison is a final order from which an appeal will lie.<sup>5</sup> And the reviewing court may examine all the evidence and order a reduction of the amount.<sup>6</sup> But the evidence cannot be reviewed upon *habeas corpus* or *certiorari*.<sup>7</sup> The appeal from the order of commitment does not stay proceedings to enforce instalments of alimony which subsequently become due.<sup>8</sup>

<sup>1</sup> O'Callaghan v. O'Callaghan, 69 Ill. 552.

<sup>2</sup> Potts v. Potts, 68 Mich. 492, 36 N. W. 240; Edison v. Edison, 56 Mich. 185; Sanchez v. Sanchez, 21 Fla. 346; Sandford v. Sandford, 44 Hun, 563; Stahl v. Stahl, 12 N. Y. Supp. 854; Brown v. Brown, 22 Mich. 299; Ryckman v. Ryckman, 32 Hun, 193; Zimmerman v. Zimmerman, 113 N. C. 432, 18 S. E. 334. For procedure consult Petree v. P., 40 Ill. 334.

<sup>3</sup> Potts v. Potts, 68 Mich. 492, 36 N. W. 240; State v. Dist. Ct., 42 Minn. 40, 43 N. W. 686; *Ex parte* Robinson, 71 Cal. 608; Davis v. Davis, 83 Hun, 500.

<sup>4</sup> Zimmerman v. Zimmerman, 14 N. Y. Supp. 444, 26 Ab. N. C. 366;

Fairchild v. Fairchild, 13 A. 599, not reported in N. J. Equity Reports. See, also, Rapalje on Contempt, § 104, citing Pitt v. Davidson, 37 N. Y. 234; s. c., 37 Barb. 97; Fisher v. Raab, 56 How. Pr. 218.

<sup>5</sup> S. v. Dent, 29 Kan. 416, citing Whittem v. S., 36 Ind. 196.

<sup>6</sup> Grayley v. Grayley, 31 How. 475; Pinckard v. Pinckard, 23 Ga. 286; Haines v. Haines, 35 Mich. 138. See *contra*, Russell v. Russell, 69 Me. 336.

<sup>7</sup> *Ex parte* Wilson, 73 Cal. 97; *Ex parte* Cottrell, 59 Cal. 420; *In re* Bissell, 40 Mich. 63; Wright v. Wright, 74 Wis. 439; State v. Dist. Ct., 14 Mont. 396, 36 P. 757. See *In re* Spencer, 82 Cal. 110.

<sup>8</sup> Ross v. Griffin, 53 Mich. 5.

On application to release the husband from imprisonment, his inability to comply with the order of the court may be made an issue, and the question tried again as of the date of the application.<sup>1</sup> Upon proof of inability to make the required payments the defendant will be discharged.<sup>2</sup> When he has been discharged on account of his inability to comply with the order, he cannot be imprisoned again under another order because of his contempt in failing to pay sums of money afterwards becoming due under the same judgment.<sup>3</sup>

**§ 940. Writ ne exeat regno.**—The ecclesiastical court could not restrain the husband from leaving the kingdom, nor could it compel the husband to find bail. After the decree for alimony was granted, if the husband sought to avoid its payment by leaving the country, the court of chancery would restrain him by issuing the writ *ne exeat regno*.<sup>4</sup> The writ would not be issued before the decree was rendered, and there was no remedy while the case was pending in the trial court or on appeal.<sup>5</sup> American courts having jurisdiction to render decrees of divorce are generally courts of equity, or of common-law jurisdiction, and sometimes exercise both jurisdictions combined. Our courts may issue this writ, unless some other method is provided by statute, or it is prohibited by some provision of the constitution or the statutes against imprisonment for debt. The true doctrine is, that

<sup>1</sup> *Lansing v. Lansing*, 41 How. Pr. 248; *Ryer v. Ryer*, 33 Hun, 116; *McClung v. McClung*, 33 N. J. Eq. 462; *In re Ryckman*, 36 Hun, 646.

<sup>2</sup> *Nixon v. Nixon*, 15 Mont. 6, 37 P. 839.

<sup>3</sup> *Winton v. Winton*, 53 Hun, 4; s. c., 5 N. Y. Supp. 537, affirmed, 117 N. Y. 623. For minor points consult, also, *Ex parte Allen*, 6 Allen (N. B.), 398; *Gott v. Gott*, 10 Grant Ch. 543; *Mackpherson v. Mackpherson*, 2 Chy. Chamb. 222; *Needham v. Needham*, 29 Grant, 117; *Purcell v. Purcell*, 4 Hen. & Mufn. 507.

<sup>4</sup> *Shaftoe v. Shaftoe*, 7 Ves. 171; *Dawson v. Dawson*, 7 Ves. 173; *Haffey v. Haffey*, 14 Wis. 261; *Head v. Head*, 3 Atk. 295; *Read v. Read*, 1 Cas. Ch. 115; *Oldham v. Oldham*, 7 Ves. 410; *Street v. Street*, Turn. & R. 322; *Cock v. Ravie*, 6 Ves. 288; *Anonymous*, 2 Ves. Sen. 489; *Anonymous*, 2 Atk. 201; *Smithson's Case*, 2 Vent. 345; *Ex parte Whitmore*, 1 Dick. 143.

<sup>5</sup> *Coglar v. Coglar*, 1 Ves. Jr. 94; *Street v. Street*, 1 Turn. & Russ. 322.

our courts are not deprived of the jurisdiction to issue this writ by such provisions in cases where the court can render a personal judgment against the defendant, which can be enforced by attachment for contempt, and where he must be personally present to answer its decree, but not in actions for a mere money demand.<sup>1</sup> To protect the wife's interests, and to secure the payment of alimony, our courts may issue the writ as soon as the bill is filed, where the wife has reason to believe that the husband is about to leave the state to avoid paying any alimony which may be awarded her.<sup>2</sup> The writ may issue at any time after decree.<sup>3</sup> The affidavit of the wife alone is sufficient; and it should show that the husband is about to leave the state, and that his departure will defeat her alimony.<sup>4</sup> In some cases her affidavit that she believes the defendant is about to remove from the state will be sufficient, though ordinarily the fact must be established by a positive affidavit.<sup>5</sup> When the writ is issued, it must fix the amount of security which will be required of the husband.<sup>6</sup> The husband may be discharged upon his paying into court the amount required. But the fact that he has given security will not permit him to leave the state. If it appears that the plaintiff has no case, or that he is not going out of the state, the defendant will be released; but

<sup>1</sup> *Macolm v. Andrews*, 68 Ill. 100; 10 N. J. Eq. 138. See practice in *Ex parte Harker*, 49 Cal. 465; *Taber v. Taber*, 16 N. Y. Sup. 613; *Adams v. Whitcomb*, 46 Vt. 708; *Brown v. Haff*, 5 Paige, 234; *Beckwith v. Smith*, 54 Barb. 212; *Dean v. Smith*, 23 Wis. 483; *Bonesteel v. Bonesteel*, 28 Wis. 245; *Meyer v. Meyer*, 25 N. J. Eq. 28; *Samuel v. Wiley*, 50 N. H. 353. See action for separate maintenance, *Harper v. Rooker*, 52 Ill. 370; *Jamieson v. Jamieson*, 53 How. Pr. 112.

<sup>2</sup> *McGee v. McGee*, 8 Ga. 295; *Prather v. Prather*, 4 Des. 33; *Devall v. Devall*, 4 Des. 79; *Bylandt v. Bylandt*, 6 N. J. Eq. 28; *Yule v. Yule*,

10 N. J. Eq. 138. See practice in *Ex parte Harker*, 49 Cal. 465; *Taber v. Taber*, 16 N. Y. Sup. 613; s. c., 60 N. Y. Supr. 65; *Boucicault v. Boucicault*, 59 How. Pr. 131, 21 Hun, 431; *Hammond v. Hammond*, 1 Clark Ch. 151.

<sup>3</sup> See note, *Lyon v. Lyon*, 21 Conn. 185.

<sup>4</sup> *Yule v. Yule*, 10 N. J. Eq. 138.

<sup>5</sup> *Collinson v. Collinson*, 18 Ves. 352; *Yule v. Yule*, 10 N. J. Eq. 138. See affidavit and proceedings in *Gardiner v. Gardiner*, 3 Abb. N. C. 1.

<sup>6</sup> *Denton v. Denton*, 1 Johns. Ch. 364.

the court may require him to give security that he will answer such sum as may be awarded against him.<sup>1</sup>

**§ 941. Other means of enforcing payment.**—The order for permanent maintenance or alimony may be enforced by methods other than attachment for contempt. Sequestration may be resorted to where the husband has available property.<sup>2</sup> In some states the various instalments of alimony as they become due may be satisfied by execution and garnishment.<sup>3</sup> The decree is often a lien upon the real estate of the husband by virtue of the statute, as such decree is like other judgments.<sup>4</sup> But in some states the decree is not a lien unless made so by the terms of the decree.<sup>5</sup> The power to secure the payment of alimony by making the decree a specific lien upon the husband's real estate is denied under some forms of the statute.<sup>6</sup> The decree may

<sup>1</sup> For further questions relating to practice, see Daniel's Chancery Practice, 1698.

<sup>2</sup> Stratton *v.* Stratton, 77 Me. 373; Hills *v.* Hills, 76 Me. 486; Donnelly *v.* Shaw, 7 Ab. N. Cas. 264; Becker *v.* Becker, 15 Ill. Ap. 247; Forrest *v.* Forrest, 9 Bosw. 686; Foster *v.* Townsend, 2 Ab. N. Cas. 29; Blenkinsopp *v.* Blenkinsopp, 12 Beav. 586; Mintzer *v.* Mintzer, 10 W. N. C. 336. See, also, Clinton *v.* Clinton, 1 P. & M. 215; Cook *v.* Cook, 15 P. D. 116; Allen *v.* Allen, 10 P. D. 187.

<sup>3</sup> Taylor *v.* Gladwin, 40 Mich. 232; Robinson *v.* Robinson, 79 Cal. 511, 21 P. 1095; Van Cleave *v.* Bucher, 79 Cal. 600, 21 P. 954; Piatt *v.* Piatt, 9 Ohio, 37; Yelton *v.* Handley, 28 Ill. Ap. 640; Foster *v.* Foster, 130 Mass. 189; Morton *v.* Morton, 4 Cush. 518; Newcomb *v.* Newcomb, 12 Gray, 28; Chase *v.* Ingalls, 97 Mass. 524; Weaver *v.* Weaver, 7 Utah, 296; Fletcher *v.* Henley, 18 La. 150; Compton *v.* Arial, 9 La. An. 496.

<sup>4</sup> Sapp *v.* Wightman, 103 Ill. 150; Kurtz *v.* Kurtz, 38 Ark. 119; Stoy *v.* Stoy, 41 N. J. Eq. 370; Keys *v.* Scanlon, 63 Wis. 345; Wilson *v.* Wilson, 40 Ia. 230; Segear *v.* Segear, 23 Neb. 306. As to enforcement of decree against a homestead, see Homestead, § 1031.

<sup>5</sup> Errisman *v.* Errisman, 25 Ill. 136; Wightman *v.* Wightman, 45 Ill. 167; Perkins *v.* Perkins, 16 Mich. 162; Walsh *v.* Walsh, 61 Mich. 554; Sesterhen *v.* Sesterhen, 60 Ia. 301; Byers *v.* Byers, 21 Ia. 268; Harshberger *v.* Harshberger, 26 Ia. 503; Min Young *v.* Min Young, 47 O. St. 501; Johnson *v.* Johnson, 125 Ill. 510.

<sup>6</sup> Olin *v.* Hungerford, 10 Ohio, 268; Kurtz *v.* Kurtz, 38 Ark. 119; Casteel *v.* Casteel, 38 Ark. 477. In Nebraska compare Swansen *v.* Swansen, 12 Neb. 210, and Brotherton *v.* Brotherton, 14 Neb. 186, with Segear *v.* Segear, 23 Neb. 306; Nygren *v.* Nygren (Neb.), 60 N. W. 885. Under such statute it is a

order the land sold for the payment of alimony.<sup>1</sup> The court has power to compel the husband to give sufficient security for the payment of alimony.<sup>2</sup> If the husband is about to dispose of his property and leave the state to avoid the payment of temporary alimony, he may be enjoined from doing so and a receiver may be appointed to take charge of the property.<sup>3</sup> Where the husband does not pay taxes, and interest upon debts secured by mortgage on his property, the court may appoint a receiver to take charge of the rents and profits and apply them to claims against the property and to the payment of alimony.<sup>4</sup>

The wife may maintain a suit on a decree for alimony, but the courts are not agreed upon the form of the action. In some states *scire facias* will lie.<sup>5</sup> But in other states debt is the proper form of action.<sup>6</sup> The action is generally in a

harmless error to make the decree a specific lien, as it will continue to be a general lien upon a homestead which can be sold under an ordinary execution. *Mahoney v. Mahoney* (Minn.), 61 N. W. 334.

<sup>1</sup> *McBee v. McBee*, 48 Tenn. (10 Heisk.) 558.

<sup>2</sup> *Wright v. Wright*, 74 Wis. 439, 43 N. W. 145; *Park v. Park*, 18 Hun, 466, 80 N. Y. 156; *Sapp v. Wightman*, 103 Ill. 150; *Galusha v. Galusha*, 108 N. Y. 114; *Gane v. Gane*, 46 N. Y. Supr. 218; *Howarth v. Howarth*, 11 P. D. 68; *Harper v. Rooker*, 52 Ill. 370; *Reiffenstein v. Hooper*, 36 U. C. B. 295; *Rice v. Rice*, 13 Ind. 562; *Prather v. Prather*, 4 Des. 33; *Errisman v. Errisman*, 25 Ill. 186. Such order may

compel the husband to give security by mortgage on property in another state. *Alderson v. Alderson*, 84 Ia. 198, 50 N. W. 671. But specific performance of such order must be enforced by the court

which made the order, and cannot be enforced by a suit in the state where the lands are situated. *Bullock v. Bullock* (N. J. Eq.), 27 A. 435.

<sup>3</sup> *Carey v. Carey*, 2 Daly, 424. The injunction and *lis pendens* may be set aside to permit the husband to mortgage the property to pay the decree for alimony. *White v. White*, 97 Cal. 604.

<sup>4</sup> *Holmes v. Holmes*, 29 N. J. Eq. (2 Stew.) 9; *Murray v. Murray*, 84 Ala. 363; *Forrest v. Forrest*, 9 Bos. 686.

<sup>5</sup> *Knapp v. Knapp*, 134 Mass. 353; *McCracken v. Swartz*, 5 Or. 62, 24 A. 670; *Hewitt v. Hewitt*, 1 Bland, 101; *Morton v. Morton*, 4 Cush. 518; *Chestnut v. Chestnut*, 77 Ill. 346; *Hansford v. Van Auken*, 79 Ind. 302; *Prescott v. Prescott*, 62 Me. 428.

<sup>6</sup> Compare *Elmer v. Elmer*, 150 Pa. 205, 24 A. 670; and *Clark v. Clark*, 6 Watts & S. 85; *Howard v. Howard*, 15 Mass. 196.

court of equity, since the decree is directed by a court of equity and cannot properly be enforced in an action at law.<sup>1</sup>

**§ 942. Suit on foreign decree for alimony.**—A decree for alimony rendered by a foreign court may be enforced in this country by the same process as a decree obtained in another state. The wife may maintain a suit in equity to recover the arrears of alimony. It would seem that when a decree is rendered upon a foreign decree that the court could exercise any of its powers as a court of equity, and enjoin the husband from conveying his property, compel him to give security for the alimony to become due, and enforce the payment of the decree by sequestration and other processes of courts of equity. But in New York it is held that an action at law to recover instalments of alimony as they accrue is the plain and adequate remedy, and that equity can afford no further relief. “It is said the defendant may depart or make away with his property. But against that contingency the ancillary processes of arrest, attachment and injunction afford a sufficient safeguard. It is said again that still the plaintiff has no security for future alimony. But the French decree does not sequester the defendant’s property; and in the absence of any lien or other specific claim on such property he has a right to dispose of it, and plaintiff’s reliance is on his personal credit.” . . . “The *lex fori*—the law of this state—gives effect to a right of alimony acquired abroad only by an action for its recovery.”<sup>2</sup>

**§ 943. Suit on decree for alimony rendered in another state.**—The husband cannot escape his liability under a decree for alimony by leaving the state. The federal courts or the courts of other states will enforce her decree.<sup>3</sup> It was at one time held that an action in equity to enforce a decree for alimony rendered in another state could not be

<sup>1</sup> *Van Buskirk v. Mulock*, 3 Har-  
rison, 184; *Allen v. Allen*, 100 Mass.  
373.

ing *Barber v. Barber*, 21 How.  
(U. S.) 582.

<sup>2</sup> *Wood v. Wood*, 28 N. Y. Supp.  
154, 7 Misc. R. (N. Y.) 579, criticis-

<sup>3</sup> *Van Buskirk v. Mulock*, 3 Har-  
rison, 184. See, *contra*, *Bullock v.  
Bullock* (N. J.), 27 A. 435.

maintained because such decree was not a fixed judgment or debt, but was a mere adjudication of the husband's duty to support, and consequently subject to the revision of the trial court at any time.<sup>1</sup> But this ruling is not followed to any extent, and was soon after discredited in a subsequent proceeding between the same parties in the federal courts.<sup>2</sup> The power to revise the decree for alimony should not deter the courts of other states from granting relief; for, if the decree is erroneous or oppressive, the husband may have the same revised by the court which rendered it. Until this is done, the decree stands in some respects as an erroneous decree, and is otherwise valid if the court in which it was rendered had jurisdiction. The courts of other states cannot change the terms of the decree.<sup>3</sup> Nor will the courts of one state refuse to enforce the decree of another because such decree was rendered in an action for alimony without divorce and such relief could not be obtained within the state. It is nevertheless a judgment of another state and entitled to the full faith and credit required by the constitution of the United States, although alimony without divorce may be a remedy not afforded by the laws of the state.<sup>4</sup> In a suit upon a decree for alimony rendered in another state, the jurisdiction of the court which rendered the decree may be questioned and the action dismissed if there was no personal service upon the husband and he did not enter appearance.<sup>5</sup> If for any reason the decree for alimony is erroneous, this will not be a defense to an action on such decree in

<sup>1</sup> *Barber v. Barber*, 1 Chand. (Wis.) 280. Such decree is not merely interlocutory. *Dow v. Blake*, 46 Ill. Ap. 329; s. c., 148 Ill. 76, 35 N. E. 761.

<sup>2</sup> *Barber v. Barber*, 21 How. (U. S.) 582, followed in *Brisbane v. Dobson*, 50 Mo. Ap. 176.

<sup>3</sup> In an action to foreclose a mortgage in Iowa, given to secure a decree of alimony rendered in Wisconsin for the reasonable sup-

port of the wife after a child reached a certain age, it was held that the Wisconsin court had exclusive jurisdiction to determine the amount of such support. *Alderson v. Alderson*, 84 Ia. 198, 50 N. W. 671.

<sup>4</sup> *Stewart v. Stewart*, 27 W. Va. 167.

<sup>5</sup> See *Rigney v. Rigney*, 6 N. Y. Supp. 141, reversed 127 N. Y. 408, 28 N. E. 405.

another state. The husband's remedy is to apply to the court which rendered the decree to have the same vacated. Where the husband obtained an absolute divorce in Kentucky, and afterwards the wife obtained a decree for divorce and alimony in Ohio, she may enforce the decree for alimony against the lands of the husband in Kentucky if the Ohio court had jurisdiction, although the Ohio court might have erred in granting alimony under the circumstances.<sup>1</sup>

The proceeding to enforce a decree for alimony is generally a suit in equity. But an action of debt will also lie in most states.<sup>2</sup> The amount of the decree and all the unpaid instalments may be recovered as if the decree was a judgment in an action at law, although the courts of equity in England refused to enforce more than the arrears of alimony for one year preceding the application in such courts.<sup>3</sup>

An action may be maintained by the wife against the husband in the federal courts to enforce the payment of arrears of alimony. Federal courts have no jurisdiction to award alimony, but derive their jurisdiction in such cases from the general jurisdiction of courts of equity. Such courts exercise the same jurisdiction as the chancery court of England, which would enforce the payment of alimony. The courts also have jurisdiction on the ground that the parties reside in different states, whether the decree is an absolute divorce or a separation from bed and board.<sup>4</sup> In either case the wife has a right to acquire a separate domicile, and the suit to enforce a decree for alimony is a controversy between citizens of different states.<sup>5</sup> The jurisdiction of the federal courts is well illustrated by the leading case of *Barber v. Barber*.<sup>6</sup> The wife obtained a decree for alimony, and for separation from bed and board, in a suit in New York, where both parties were domiciled. The hus-

<sup>1</sup> Rogers *v.* Rogers, 15 B. Mon. 364.

<sup>3</sup> Id.

<sup>2</sup> Brisbane *v.* Dobson, 50 Mo. Ap. 170;

<sup>4</sup> *Barber v. Barber*, 21 How. (U. S.)

Dow *v.* Blake, 148 Ill. 76, 35 N. E. 761.

<sup>5</sup> Bennett *v.* Bennett, Deady, 299.

<sup>6</sup> 21 How. (U. S.) 582.

band refused to pay the alimony awarded, and removed to Wisconsin, where he obtained an absolute divorce from his wife, who remained in New York. The wife brought suit in Wisconsin and the supreme court of that territory held that the action would not lie. Subsequently the wife brought a suit in equity in the circuit court of the United States for that territory, and recovered a decree against the husband, which was affirmed on appeal to the supreme court of the United States. The decision of the latter court affirms the jurisdiction of the federal courts, and holds that the Wisconsin decree *a vinculo* did not affect the force and validity of the decree for alimony rendered in New York.<sup>1</sup>

<sup>1</sup> This case is followed in *Cheever v. Wilson*, 76 U. S. 108.

## DIVISION AND RESTORATION OF PROPERTY.

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§ 960. In general.	§ 964. Enforcing agreement to convey title.
961. Whether the property allotted is alimony.	965. How the property is divided.
962. Division of property by divesting title.	966. Practice in the division of property.
963. Division of property by other means.	.

**§ 960. In general.**—The *status* of a wife, divorced for causes arising subsequent to the marriage, was unknown at the common law. When an absolute divorce is granted the wife is placed in a new position, and the statute must authorize the court to make some provision for her. In the absence of statute our courts have no jurisdiction or common-law power to grant an absolute divorce, or to grant further relief after such divorce. The courts have, therefore, only such power to provide for the wife after a dissolution of the marriage as is conferred by the statutes. The legislatures of the various states have accordingly authorized the courts to give the wife an allowance after divorce, and in most cases have called this allowance alimony, or permanent alimony. In a few states these terms have been avoided; and the courts have been authorized to provide for the wife out of the real and personal estate of both parties, or to divide the real and personal estate.<sup>1</sup>

When an absolute divorce is granted the policy of our law encourages subsequent marriages, and does not hold the property of the parties with a view to reconciliation and reunion. The common law proceeded upon an entirely dif-

<sup>1</sup> See Parsons *v.* Parsons, 9 N. H. 309 (1838).

ferent policy. It contemplated a reunion, and granted the wife a liberal allowance for her support until this was consummated. No property was disturbed and no titles were divested. But the absolute divorce is an ultimate remedy, a last resort. The parties must be relieved of the marital relation in every respect. Their separate property must be restored; and their common property, the result of mutual labor and contribution, must be divided. It is clear that the property should be divided so as not to interfere with the obligations of a subsequent marriage. If an allowance is granted to the wife out of the husband's income during their joint lives, he is placed in the anomalous and burdensome position of supporting two wives, if he should marry again. If the divorced wife should marry again he will not be relieved of supporting her; although she has become the wife of another. The injustice of such decrees has often induced the husband to refuse further payments; and his vigorous protest has often caused contempt proceedings to be brought against him. If the decree for alimony is not secured by real estate, the husband will frequently defeat all attempts to enforce its payment. If the court grant the use of the husband's land during their joint lives, this will prevent the improvement and sale of the property, and is in other ways contrary to our policy concerning the title to real estate. If the decree is made a lien upon real estate, this may necessitate its sale; and the proceeds may be wasted by the wife. If a gross sum is awarded her, to be paid immediately, it will impose a heavy burden upon the husband, often forcing him to sacrifice his property at sale, or to borrow money at high rates of interest. Many of these difficulties may be avoided by distributing the personal property and awarding the wife a portion of the real estate in fee. This she may lease, incumber or convey as the circumstances may require. A final accounting and distribution of the property of both parties is to be preferred to a decree of alimony; because the parties are free to marry again, their rights are adjudicated and secured without unnecessary sacrifice, and their

titles are clear and unincumbered. A decree of divorce is therefore a final settlement as to all property rights of the husband and wife.

In some states a similar remedy is provided by statutes directing the court to grant alimony to the wife, and to restore to her the whole, or such part as may seem reasonable, of the personal estate that came to the husband by reason of the marriage. Where such statutes were enacted before the enactment of the married women's act, it is clear that it refers to the property rights of the husband at common law, and the object of such statute was to restore such property to the wife. It is held that property obtained from the wife as a gift is not within the meaning of such statute.<sup>1</sup> But this is not important, since the court, in making an allowance to the wife, may consider any gifts made to the husband, and increase the allowance according to the circumstances of the case and not according to the rigid rules of law.<sup>2</sup> This form of statute contemplates a restoration of the property by a decree of the court based on proper pleadings. A divorce will not, by mere operation of the statute, restore to each the property owned before marriage.<sup>3</sup>

**§ 961. Whether the property allotted is alimony.**—If the common-law definition of alimony is adhered to, the term should only be applied to the provision for the support of the wife after a decree of separation.<sup>4</sup> In its technical meaning it is an allowance paid by a husband to a wife during a judicial separation. But if the marriage is dissolved, there is no wife, no husband, and consequently no alimony. An allotment of real estate awarded to the wife after a dis-

<sup>1</sup> Dillon *v.* Starin (Neb.), 63 N. W. 12.

mortgage, and while it was pending the wife obtained a divorce.

It was held that the divorce did not revive the mortgage debt which was extinguished by the marriage.

For allowance of dower on divorce, see Dower, § 1026.

<sup>2</sup> See Permanent alimony, § 909.

<sup>3</sup> Farley *v.* Farley, 91 Ky. 497. In this case the wife, while a *feme sole*, executed a note and mortgage to a man to whom she was afterward married. The husband commenced an action to foreclose the

<sup>4</sup> See distinction made in Miller *v.* Clark, 23 Ind. 370.

solution of the marriage is in the nature of a settlement of mutual accounts, in which not only the maintenance of the wife, but also the conduct of both parties, is considered, and compensation is allowed for her right of dower, and for the wrong inflicted upon her by the cause for divorce. It is a final adjudication of property rights of the parties, and is not subject to changes according to the needs of the wife or the wealth of the husband.<sup>1</sup> The death of either party will not affect the property rights of the other.<sup>2</sup> The allotment is similar to a decree for alimony in that it is granted after divorce and provides in part for the maintenance of the wife. But in all other respects the two are different, and to call the allotment alimony, or permanent alimony, is a misnomer leading to confusion of terms.<sup>3</sup> But inadvertently, or for want of a better term, the courts have called this division of real and personal property "alimony."<sup>4</sup>

**§ 962. Division of property by divesting title.**—In some states the statute in express terms directs the court to divide the real and personal property.<sup>5</sup> In other states the power

<sup>1</sup> *Bacon v. Bacon*, 43 Wis. 197; *Blake v. Blake*, 68 Wis. 303; *Petersine v. Thomas*, 28 O. St. 596.

<sup>2</sup> *Miller v. Clark*, 23 Ind. 370.

<sup>3</sup> *Ex parte Spicer*, 83 Cal. 460.

<sup>4</sup> See *Ross v. Ross*, 78 Ill. 402; *Daily v. Daily*, 64 Ill. 329; *Prescott v. Prescott*, 65 Me. 478; *Prescott v. Prescott*, 59 Me. 146; *Tyson v. Tyson*, 54 Md. 35; *Taylor v. Taylor*, 93 N. C. 418; *Shaw v. Shaw*, 114 Ill. 586; *Dinet v. Eigenmann*, 80 Ill. 274; *Chenault v. Chenault*, 37 Tenn. 247; *Wiggins v. Smith*, 54 N. H. 213; *Owen v. Yale*, 75 Mich. 256; *Coad v. Coad*, 41 Wis. 23; *Williams v. Williams*, 36 Wis. 362; *Gallagher v. Fleury*, 36 O. St. 590; *Moul v. Moul*, 30 Wis. 203; *Burrows v. Purple*, 107 Mass. 428; *Broadwell v. Broadwell*, 21 O. St. 657.

<sup>5</sup> See *Brandon v. Brandon*, 14 Kan. 342; *Busenbark v. Busenbark*, 33 Kan. 572; *Blankenship v. Blankenship*, 19 Kan. 159; *Broadwell v. Broadwell*, 21 O. St. 657; *Faulkner v. Faulkner*, 15 S. W. 523; *Herron v. Herron*, 47 O. St. 544; *Petersine v. Thomas*, 36 O. St. 590; *Lovett v. Lovett*, 11 Ala. 763; *Quarles v. Quarles*, 19 Ala. 363; *Whittier v. Whittier*, 11 Foster (N. H.), 452; *Webster v. Webster*, 2 Wash. St. 417, 26 P. 864; *Swett v. Swett*, 49 N. H. 264; *Barker v. Cobb*, 36 N. H. 264; *Sheafe v. Sheafe*, 40 N. H. 516. As to division of community property, see *White v. White*, 86 Cal. 219, 24 P. 996; *Cummings v. Cummings*, 75 Cal. 434; *Harris v. Harris*, 71 Cal. 314; *Simpson v. Simpson*, 80 Cal. 237;

to divide real property and vest the fee in the wife is derived from the statutes, which in general terms authorize the court to provide maintenance for the wife and children. Thus in Illinois the statute provides that: "When a divorce shall be decreed the court may make *such order* touching the alimony and maintenance of the wife, the care, custody and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just; and, in case the wife be complainant, to order the defendant to give reasonable security for such alimony and maintenance, or may enforce the payment of such alimony and maintenance in any other manner consistent with the rules and practice of the court." This statute is held to be so general in its terms as to permit the court to assign as alimony to the wife a part of the real estate of the husband in fee.<sup>1</sup> Thus, where the wife purchased lands with the proceeds of the husband's property, the court, on granting her a decree for his desertion, directed the wife to convey one-half of the land to the husband.<sup>2</sup>

The statute of New Jersey makes no distinction between the absolute divorce and the decree of separation, but provides that, "when a divorce shall be decreed, it shall and may be lawful for the court of chancery to take (make) such order touching the alimony and maintenance of the wife, and also touching the care and maintenance of the children or any of them, by the said husband, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just." The vice-chancellor held that as the statute was remedial it should be liberally construed, and that its terms permitted the court to decree the husband's property in fee to the wife as alimony.<sup>3</sup> But on appeal the

*Eslinger v. Eslinger*, 47 Cal. 62; *Iiff v. Jolliff*, 32 Ill. 527; *Robbins v. Miller*, 33 Cal. 353; *De Robbins*, 101 Ill. 416; *Hopper v. Godney*, 39 Cal. 157; *Hopper*, 19 Ill. 219. <sup>2</sup> *Stewartson v. Stewartson*, 15 P. 267.

<sup>1</sup> *Armstrong v. Armstrong*, 35 Ill. 109; *Wheeler v. Wheeler*, 18 Ill. 39; *Bergen v. Bergen*, 23 Ill. 187; *Jol-*

<sup>3</sup> *Calame v. Calame*, 24 N. J. Eq. 441.

chancellor refused to follow this interpretation. The terms "alimony" and "maintenance" were technical words having a fixed and established meaning, and had not received this construction; although the statute had been in force more than fifty years. "Nor" can I "perceive," said he, "the force of the argument that, as these terms have acquired their meaning from having been applied to divorces from bed and board, they should have a wider scope when applied to divorces from the bond of matrimony. How is a change of meaning to be implied, when language, understood technically, is certainly not inapt when used in either connection? . . . The clause under consideration relates to both kinds of divorces, so that, if land can be awarded as alimony where there is a divorce from the bond of matrimony, it can where there is a mere separation from bed and board. This result alone would seem to be sufficient to demonstrate the inadmissibility of the interpretation in question. In aid of this view, I will, in conclusion, point to the fact that the modes appointed by the act to enforce the payment of alimony, such as requiring security from the husband, and authorizing the sequestration of his personal estate and the rents and profits of his real estate, appear to stand in opposition to the idea that a part of the land itself can be set apart for the wife. In fine, as the legislative language, putting upon it its well settled meaning, will not lead to any absurd or unreasonable result, in my opinion the section must be held to import that, where an allowance is made under its authority, such allowance must be alimony, that is, money payments of the character of an annuity."<sup>1</sup>

In New York the provision relating to alimony<sup>2</sup> does not permit any relief other than the alimony of the common law. It is held that the court has no power to set apart a portion of the household furniture for the use of the wife.<sup>3</sup>

<sup>1</sup> Id., 25 N. J. Eq. 548. In this case the same relief was granted on the ground that the husband had agreed to convey the property in question.

<sup>2</sup> Sec. 1766 of the Code.

<sup>3</sup> Doe v. Doe, 52 Hun, 405; s. c., 5 N. Y. Supp. 415. This is a narrow and erroneous construction of the liberal discretion conferred by the

The statute in Wisconsin provides that "The court shall, in all cases, subject to the provisions of this chapter, regulate the division and distribution of the estate, real and personal, between the parties, and the allowance of alimony to the wife, or to her and the minor children committed to her care and custody, according to equity and good conscience, having always due regard to the legal and equitable rights of each party; but nothing contained in this chapter shall authorize the court to divest any party of their title to or interest in any real estate, further than is expressly specified herein." The last portion of this section is held to prohibit the court from divesting a party of his title to real estate in all cases except as provided in the same section, but not in all cases. The practice in this state is to divest the guilty party of the title to real estate and transfer the property, or a portion of it, to the innocent party in fee.<sup>1</sup>

The Kentucky code<sup>2</sup> provides that every decree of divorce shall contain an order of restitution of any property not disposed of at the commencement of the action which either party may have obtained directly or indirectly from or through the other during marriage. Where the wife has obtained the property through a decree of separation, she holds the same, although the husband subsequently obtains a decree of absolute divorce containing the order of restitution.<sup>3</sup>

In Nevada the statute provides that, "when the marriage provision which authorizes the court, "in the final separation, to give such directions as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties."

586; *Wilke v. Wilke*, 28 Wis. 296; *Damon v. Damon*, 28 Wis. 510; *Williams v. Williams*, 36 Wis. 362; *Thomas v. Thomas*, 41 Wis. 229; *Varney v. Varney*, 58 Wis. 19. See *dictum* to contrary in Nebraska, *Ellis v. Ellis*, 13 Neb. 91, 18 N. W. 29.

<sup>2</sup> Sec. 425, Civ. Code.

<sup>3</sup> *Johnson v. Johnson* (Ky.), 29 S. W. 322; *Flood v. Flood*, 5 Bush, 167. See, also, *Williams v. Gooch*, 3 Metc. 486; *Bennett v. Bennett*, 26 S. W. 392.

<sup>1</sup> *Donovan v. Donovan*, 20 Wis.

shall be dissolved by the husband being sentenced to imprisonment, and when a divorce shall be ordered for the cause of adultery committed by the husband, the wife shall be entitled to the same proportion of his lands and property as if he were dead; but in other cases the court may *set apart* such portion for her support and the support of their children as shall be deemed just and equitable." The term "set apart" means a division of property, and authorizes the court to divest one party of title and convey it to the other.<sup>1</sup>

Where the alimony must be in gross, and not in annual payments, the courts have no implied power to divest one party of title or to set apart a certain share of real estate.<sup>2</sup> The court may give the wife absolute title to lands under a statute providing that, "when a divorce is decreed, the court may make *such order* in relation to the children and property of the parties, and the maintenance of the wife, as shall be right and proper."<sup>3</sup>

**§ 963. Division of property by other means.**—The statutes providing for a division of property after a dissolution of the marriage confer a broad discretionary power upon the courts to provide for the equitable settlement of the property of both parties. The best policy will generally require a division of the real estate, giving the wife some productive property which will yield her an income, and allowing the husband to retain any property which is incumbered, or which requires attention or further investment. It is immaterial who holds the legal title to the property, since the decree of the court may divest the title and convey it to the other.<sup>4</sup> This method is to be preferred, because the property

<sup>1</sup> Powell *v.* Campbell, 20 Nev. 232; Ewen, 26 Ia. 375; Zuver *v.* Zuver, 36 Ia. 190; Twing *v.* O'Mera, 59 Ia. 326. See different construction in

<sup>2</sup> Green *v.* Green, 7 Ind. 113; Rice *v.* Rice, 6 Ind. 100; Musselman *v.* Musselman, 44 Ind. 106; Alexander *v.* Alexander (Ind.), 40 N. E. 55. Russell *v.* Russell, 4 Greene (Ia.), 26; Hunt *v.* Hunt, 4 Greene, 216; Dupont *v.* Dupont, 10 Ia. 112.

<sup>3</sup> Jolly *v.* Jolly, 1 Ia. 9; O'Hagan *v.* O'Hagan, 4 Ia. 509; Jungk *v.* Jungk, 5 Ia. 541; McEwen *v.* Mc-

<sup>4</sup> Gallagher *v.* Gallagher, 89 Wis. 461, 61 N. W. 1104.

will not be sacrificed at forced sale by execution or injure the financial standing of the parties. Third persons interested in the real estate will have an opportunity to protect their rights after the division of the property. If the parties desire to forgive the past, and renew the marital relation, they may do so without the loss or disturbance of their property rights. There are also many other considerations which may render a division of the property and a divesting of title the most satisfactory remedy.

But the statutes permit a departure from this method where the circumstances will not permit of a divesting of title or the allotment of specific property. One party may be awarded the use of the real estate or a portion of it during good behavior or while single. In some instances the wife is awarded the use of the real estate for life.<sup>1</sup> Where the property consists of real estate and division of it is impractical or will destroy its desirability or productiveness, or interfere with vested rights of creditors, the court may award a gross sum of money as an equivalent.<sup>2</sup> This sum may be secured by making the decree a lien on the property, where the decree would not have that effect by operation of statute. Or the court may make other orders securing the payment of such sum, without forcing the sale of real estate.<sup>3</sup> Where the wife is inexperienced or without business ability the court may find it expedient to award the wife a residence or a small portion of the real estate and a reasonable amount of alimony.<sup>4</sup> Or the division may be adjusted by awarding a portion of real estate and a sum of money.<sup>5</sup> The

<sup>1</sup> *Lovett v. Lovett*, 11 Ala. 763; *Shaw v. Shaw*, 114 Ill. 586; *Rogers v. Vines*, 6 Ire. 293; *Keating v. Keating*, 48 Ill. 241; *Sammis v. Medbury*, 14 R. I. 214.

<sup>2</sup> *Benedict v. Benedict*, 58 Conn. 326; *Lyon v. Lyon*, 21 Conn. 184; *Sanford v. Sanford*, 5 Day, 353;

*Von Glahn v. Von Glahn*, 46 Ill. 134; *Blankenship v. Blankenship*,

19 Kan. 159; *Holmes v. Holmes*, 2 Jones' Eq. 334; *Royston v. Royston*, 13 Ga. 425.

<sup>3</sup> *McClung v. McClung*, 42 Mich. 53.

<sup>4</sup> *Armstrong v. Armstrong*, 35 Ill. 109. See *contra*, *Quarles v. Quarles*, 19 Ala. 363.

<sup>5</sup> See *Brooks v. Akeny*, 7 Or. 461; *Varney v. Varney*, 58 Wis. 19.

husband may be compelled to pay off the incumbrances upon the property awarded to the wife.<sup>1</sup> Or the wife may be compelled to pay the taxes and incumbrances, and divide the profits of the homestead allotted to her, paying the husband in semi-annual instalments.<sup>2</sup> The court may allow the wife to retain property held in her name, and require her to pay the husband a certain sum of money or to secure such sum by mortgage on her real estate.<sup>3</sup> Where the court has power to divide the real estate, the title cannot be awarded to the children, or to the wife in trust for the children.<sup>4</sup> If the statute provides that alimony may be awarded out of real and personal property, it is not error to award alimony in the usual form.<sup>5</sup>

The provision of the statute relating to the division of the property, and providing for a suitable allowance for the wife, must be liberally construed, with a view to effect its object and to promote justice. In some instances this will require a decree providing for the payment of a sum of money in instalments, or, in effect, a decree for alimony. And the court has the power to award this allowance although the statute does not use the term "permanent alimony."<sup>6</sup> This allowance is not, in fact, permanent alimony, but is a compensation for the wrong to the wife, a compensation for her right of dower, or for her interest in the community property. But for want of a better term it is called "permanent alimony" in some states. In Illinois the courts have been averse to awarding the wife a portion of the real estate in fee; and have awarded in lieu thereof a permanent allowance, which is termed alimony. In a leading case in this state the wife was allowed as alimony real estate worth about \$10,000, and \$20,000 in money, this being equal to

<sup>1</sup> Cummings *v.* Cummings, 75 Cal. 434. See, also, Grosouis *v.* Northcut, 3 Or. 394; Doscher *v.* Bleckiston, 7

<sup>2</sup> Snodgrass *v.* Snodgrass, 40 Kan. 494. Or. 403; Jolliff *v.* Jolliff, 32 Ill. 527.

<sup>3</sup> Gallagher *v.* Gallagher, 89 Wis. 461, 61 N. W. 1104. 456, 16 A. 711.

<sup>4</sup> Simpson *v.* Simpson, 80 Cal. 237. <sup>5</sup> Sampson *v.* Sampson, 16 R. L. 6 In re Spencer, 83 Cal. 460.

one-third of the property owned by the husband. The appellate court refused to affirm this decree, and said: "The power of the court to decree alimony in this mode has been sanctioned by this court, but we do not deem this a proper case for its exercise. The estate of the defendant had been accumulated by him before his marriage. Her claim, therefore, to an absolute portion of it is by no means the same, in an equitable point of view, that it would be if the property were the product of the joint labors and economies of the parties during their married life. Neither did the wife bring property to the husband upon her marriage. It would then, in our opinion, be unjust to give her absolutely a large amount of property, which, in the event the death of the child followed on her own death, would go to her family, who are strangers to the blood of the defendant. Or suppose, what would be very likely to happen, that she should marry again and have children. On her death, intestate, the children by the second husband would each have the same share of this \$30,000 with the child of the defendant. . . . The statute evidently contemplated an allowance to be paid at stated intervals for the wife's support; and in the present case, as it is now before us, we should regard this as the better practice."<sup>1</sup> It appears to be the settled policy of this state to grant the wife alimony, instead of real estate in fee, where she had no means at marriage, derived none by inheritance, and the property is not accumulated during the marriage.<sup>2</sup> If the husband receives nothing from the wife, she is not entitled to any title in fee; but if her money or labor has assisted in the purchase of the land there should be a division of the property.<sup>3</sup> Although the statute does not permit a division of the property, the court may allot the use of a portion of the real estate for life as alimony.<sup>4</sup>

<sup>1</sup> *Von Glahn v. Von Glahn*, 46 Ill. 134.      <sup>3</sup> See *Robbins v. Robbins*, 101 Ill. 416.

<sup>2</sup> *Wilson v. Wilson*, 102 Ill. 297; *Keating v. Keating*, 48 Ill. 241.      <sup>4</sup> *Shaw v. Shaw*, 114 Ill. 586; *Rogers v. Vines*, 6 Ired. 293; *Russell v. Russell*, 4 Greene (Ia.), 26.

**§ 964. Enforcing agreement to convey title.**—Although the statute does not authorize the court to divest either party of title to land, and the court has no such inherent power, yet this will not preclude the court from enforcing the agreement of the parties to convey land, when a decree of divorce is rendered. Where a husband offered to convey certain land in fee to the wife, and also to pay a certain sum of money in gross, when she obtained a decree, and such offer was made and accepted in writing and set up in the petition with a prayer that the agreement be enforced, such agreement may be enforced by a court of equity as a provision in lieu of alimony. Such agreement must be valid and reasonable, and not against public policy as an agreement to live in separation.<sup>1</sup> This case was approved and followed in Missouri under a similar statute where the agreement was made in open court.<sup>2</sup> The court is not bound by the agreement of the parties, and may make an additional allowance to the wife, especially where the custody of the children is awarded to her.<sup>3</sup> Or, if the agreement is unjust and inequitable, the court will disregard it.<sup>4</sup>

**§ 965. How the property is divided.**—The statutes generally leave this question to the discretion of the court. And this is the only method by which the rights and merits of the parties can be considered, and justice tempered with mercy. Our divorce laws are, at best, harsh and arbitrary in their operation, denying relief when both parties and the interest of the state demand it, and, again, granting a dissolution of the marriage for slight offenses, when the courts would, if they had discretion, refuse divorce. But while the statutes do not give the courts any latitude as to the

<sup>1</sup> *Calame v. Calame*, 25 N. J. Eq. 548, citing and discussing the following cases: *Lucas v. Lucas*, 1 Atk. 270; *Head v. Head*, 3 Atk. 547; *Guth v. Guth*, 3 Bro. C. C. 614; *Frampton v. Frampton*, 4 Beav. 294; *Fitzer v. Fitzer*, 2 Atk. 512; *Shepard v. Shepard*, 7 Johns. Ch. 57.

<sup>2</sup> *Crews v. Mooney*, 74 Mo. 27, citing *Russell v. Russell*, 4 Greene (Ia.), 26. See, also, *Stockton v. Knock*, 73 Cal. 425.  
<sup>3</sup> *Cole v. Cole*, 23 Ia. 433.  
<sup>4</sup> *McAllister v. McAllister*, 57 Tenn. (10 Heisk.) 345.

causes for divorce, when the property rights are to be determined, the courts are free to consider all the conduct of the parties, their industry, their earnings, and the amounts they have contributed to the common fund, and in view of all the circumstances to give each party what is just and equitable. Long experience has established the wisdom of trusting this distribution of the property to the courts, and demonstrated the folly of prescribing fixed rules for this purpose. Nevertheless we still find in the statutes of some of our states a fixed proportion to be given a wife who obtains a divorce from her husband. Sometimes she is to be given the same amount as if the marriage were dissolved by death, or, in other words, the portion of a widow. In some instances the legislature has fixed a greater or less amount. These statutes operate as a fixed prize or bounty to all wives who will renounce their marital duties and obtain divorce. In some instances it may induce designing women to contract marriage to enable them to win this prize by divorce. In Oregon it is the peremptory duty of the court to decree to the innocent party one-third part of all the real estate owned by the guilty party, regardless of the equities of the case.<sup>1</sup>

The division of property after a dissolution of the marriage is sometimes made upon the theory that the court must restore to each party his or her share of the common fund, as if the marriage were annulled, and each must be placed *in statu quo*.<sup>2</sup> But the better doctrine is that the rule of equity which requires that upon a rescission of a contract the parties be placed *in statu quo* has no application to a suit for divorce.<sup>3</sup> The common-law unity of husband and wife would forbid such a theory of distribution. Such a rule would be

<sup>1</sup> Wetmore *v.* Wetmore, 5 Or. 469; Rees *v.* Rees, 7 Or. 47; Hall *v.* Hall, 9 Or. 542; Bamford *v.* Bamford, 4 Or. 30; Ross *v.* Ross, 21 Or. 9. But a foreign decree will not have this effect. Barrett *v.* Failing, 6 Sawyer, 473.

<sup>2</sup> Chunn *v.* Chunn, Meigs, 131; Musselman *v.* Musselman, 44 Ind. 106; Payne *v.* Payne, 23 Tenn. (4 Humph.) 500; McGill *v.* McGill, 19 Fla. 341.

<sup>3</sup> Willmore *v.* Willmore, 15 B. Mon. 49.

against public policy; since it would leave either party to commit a cause for divorce with impunity, knowing that upon a decree dissolving the marriage he or she would receive the same proportion of the property. And to send away an injured wife with simply what she has brought to her husband, or with an additional sum for her services during the marriage, "with nothing for her mental sufferings, nothing for her blasted prospects in life, nothing for the sacrifice of her virginity and early bloom to brutality or lust," would place her on the level of a mistress and a servant. The sound theory upon which the court should proceed in dividing the property after divorce is to compensate the wife for the wrong inflicted upon her by the cause for divorce, to compensate her for the loss of dower, and the interest in the common property, as well as to provide in part for her future support.<sup>1</sup>

In dividing the property the conduct of each party will have some influence with the court. The guilty wife will receive something, but much less than an equal share.<sup>2</sup> If the conduct of the wife has been such that she is not entitled to a divorce, but the decree cannot be reversed on appeal, the supreme court may refuse alimony, and allow the husband to retain the homestead.<sup>3</sup> Although the wife is entitled to a divorce, the court, in awarding her alimony, may consider her ante-nuptial unchastity, her fraudulent concealment of her guilt before marriage, her hasty suit for divorce, and the liberal allowance of temporary alimony during litigation.<sup>4</sup> The amount of property which the wife contributed to the common fund should be considered. Her specific property may be restored to her.<sup>5</sup> But where there

<sup>1</sup> *In re Spencer*, 83 Cal. 460.

<sup>4</sup> *Varney v. Varney*, 58 Wis. 19.

<sup>2</sup> *Lovett v. Lovett*, 11 Ala. 763; *McCafferty v. McCafferty*, 8 Blackf. 218; *Richardson v. Wilson*, 8 Yerg. 67; *Snodgrass v. Snodgrass*, 40 Kan. 494; *Tumblesome v. Tumblesome*, 79 Ind. 558.

<sup>5</sup> *Sharp v. Sharp*, 34 Tenn. (2 Sneed), 496; *Tewksbury v. Tewksbury*, 4 How. (Miss.) 109; *Kingsberry v. Kingsberry*, 3 Harr. (Del.) 8; *Grubb v. Grubb*, 1 Harr. (Del.) 516. See, also, *Flood v. Flood*, 5 Bush (Ky.), 167; *Williams v. Gooch*,

<sup>3</sup> *Ensler v. Ensler*, 72 Ia. 159.

is a distribution to be made the court may refuse to restore the wife's property to her, but will consider her contribution to the common fund, and award her accordingly.<sup>1</sup> Both the separate and the joint property may be included in the estimated fund from which the distribution may be made.<sup>2</sup>

The proportion which the wife should receive on a dissolution of the marriage is, in the absence of statute, fixed by the court according to the circumstances of the case. There is no fixed rule or proportion. The courts have not settled upon any policy which should govern the distribution. Under the common-law *status* of the wife she should have sufficient to maintain her according to the means of her husband. Modern legislation has placed the husband and wife in a *status* of equality in many of their property and social rights, but has not removed from the husband the burden of supporting the family. This duty still remains, and must be considered in a distribution of property. But if the husband has no property, the wife must submit to the misfortune.<sup>3</sup> If the property to be divided is community property, it is not clear that all of it may be awarded to the wife.<sup>4</sup> But in some cases where the wife is the innocent party and is awarded the custody of the children, the courts have found it a sound and conservative policy to award the homestead in fee to the wife.<sup>5</sup> If the wife is unable to sup-

<sup>3</sup> Met. (Ky.) 486; Kriger *v.* Day, 2 May be awarded. See Miller *v.* Miller, 33 Cal. 353; Gimmy *v.* Gimmy, 22 Cal. 633; Gimmy *v.* Doane, 22 Cal. 635; Howe *v.* Howe, 4 Nev. 469; Strozynski *v.* Strozynski, 97 Cal. 189, 31 P. 1130. But see, *contra*, Tiemann *v.* Tiemann, 34 Tex. 522; Craig *v.* Craig, 31 Tex. 203. See inventory and division of community property approved in Simons *v.* Simons, 23 Tex. 344; Trimble *v.* Trimble, 15 Tex. 18. For Louisiana see cases cited in Heffner *v.* Parker (La. An.), 17 So. 207.

<sup>4</sup> Stillman *v.* Stillman, 66 Tenn. (7 Baxter), 169.

<sup>2</sup> Webster *v.* Webster, 2 Wash. St. 417, 26 P. 864; Van Brunt *v.* Van Brunt, 52 Kan. 380, 34 P. 1117.

<sup>3</sup> Chenault *v.* Chenault, 37 Tenn. (5 Sneed), 248; Ensler *v.* Ensler, 72 Ia. 159.

<sup>4</sup> All the community property

<sup>5</sup> Brandon *v.* Brandon, 14 Kan. 342; Cole *v.* Cole, 23 Ia. 433; Boyd

port herself, all of the homestead may be awarded to her, leaving the husband to support himself by his own efforts, and by sale of some of the personal property awarded to him.<sup>1</sup> Where the property of the husband consists of a house and lot, this may be awarded to the wife, if the husband is able to support himself.<sup>2</sup>

In making the distribution the court will consider ante-nuptial agreements and marriage settlements. It would seem that the power to divest a party of title to real estate would include the power to vary or cancel marriage settlements according to the rules governing the distribution of property.<sup>3</sup> In England the courts are authorized, after annulling or dissolving a marriage, "to inquire into the existence of any ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make any such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the court shall seem fit."<sup>4</sup> The decisions under this section may be useful where a marriage settlement is to be changed after divorce.<sup>5</sup>

<sup>1</sup> *v. Boyd* (Cal.), 31 P. 1108; *Johnson v. Johnson* (Cal.), 35 P. 637. But the community property so awarded is subject to the debts of the family contracted by the husband on the faith of his ownership of such property. *Frankel v. Boyd* (Cal.), 39 P. 939.

<sup>2</sup> *Webster v. Webster*, 64 Wis. 438; *Donovan v. Donovan*, 20 Wis. 586; *Eidenmuller v. Eidenmuller*, 37 Cal. 364.

<sup>3</sup> *Wuest v. Wuest*, 17 Nev. 217, 30 P. 886; *Harran v. Harran*, 85 Wis. 299, 55 N. W. 400.

<sup>4</sup> *Hacker v. Hacker* (Wis.), 63 N. W. 278.

<sup>5</sup> 22 & 23 Vict., ch. 61, § 5.

<sup>5</sup> *A. v. M.*, 10 P. D. 178; *Bacon v.*

*Bacon*, 2 Swab. & T. 86; *Corbett v. Corbett*, 13 P. D. 136; *Corbett v. Corbett*, 14 P. D. 7; *Noakes v. Noakes*, 4 P. D. 60; *Bird v. Bird*, 1 P. & M. 231; *March v. March*, 1 P. & M. 440; *Corrancé v. Corrancé*, 1 P. & M. 495; *Smithe v. Smithe*, 1 P. & M. 587; *Worsley v. Worsley*, 1 P. & M. 648; *Graham v. Graham*, 1 P. & M. 711; *Paul v. Paul*, 2 P. & M. 93; *Sykes v. Sykes*, 2 P. & M. 163; *Milne v. Milne*, 2 P. & M. 295; *Crisp v. Crisp*, 2 P. & M. 426; *Symonds v. Symonds*, 2 P. & M. 477; *Hope v. Hope*, 3 P. & M. 226; *Gladstone v. Gladstone*, 1 P. D. 442, 3 P. & M. 160; *Benyon v. Benyon*, 1 P. D. 447; *Maudsley v. Maudsley*, 2 P. D. 256; *Yglesias v. Yglesias*, 4 P. D. 71; *An-*

The power of our courts to vary or cancel marriage settlements and conveyances of one married party to another has been denied where the statute does not confer such power. The trial court on granting a divorce found that the husband had made a voluntary settlement upon the wife of certain real property, and directed her to reconvey a specific portion thereof to the husband. The real estate was purchased by the husband with money received by him from the wife at marriage, but both parties had contributed the funds used in the erection of improvements. The supreme court of the District of Columbia affirmed the decree of the lower court.<sup>1</sup> But the supreme court of the United States reversed the decree, holding that, in the absence of any statute relating to permanent alimony, the lower court had no power to disturb a valid gift upon granting a divorce.<sup>2</sup> But in the states where the courts have statutory power to grant alimony on an absolute divorce, it seems clear that all gifts and settlements should be considered in determining the proper allowance.<sup>3</sup>

*dell v. Ansdell*, 5 P. D. 138; *Ross v. Ross*, 7 P. D. 20; *Wigney v. Wigney*, 7 P. D. 177; *Wigney v. Wigney*, 7 P. D. 228; *Jump v. Jump*, 8 P. D. 159; *Oppenheim v. Oppenheim*, 9 P. D. 60; *Clifford v. Clifford*, 9 P. D. 76; *Ponsonby v. Ponsonby*, 9 P. D. 58-122; *Noel v. Noel*, 10 P. D. 179; *Farrington v. Farrington*, 11 P. D. 84; *Smith v. Smith*, 12 P. D. 102; *Harrison v. Harrison*, 13 P. D. 180; *Pryor v. Pryor*, 12 P. D. 165; *Bosville v. Bosville*, 13 P. D. 76; *Benyon v. Benyon*, 15 P. D. 29; *Nunneley v. Nunneley*, 15 P. D. 186; *Chetwynd v. Chetwynd*, 1 P. & M. 39; *Swift v. Swift*, 15 P. D. 118; *Rollins v. Rollins*, 4 Swab. & T. 158; *Gill v. Gill*, 3 Swab. & T. 359; *Ling v. Ling*, 4 Swab. & T. 99; *Stone v. Stone*, 3 Swab. & T. 372; *Carstairs*

*v. Carstairs*, 3 Swab. & T. 538; *Callwell v. Callwell*, 3 Swab. & T. 259; *Norris v. Norris*, 1 Swab. & T. 174; *Webster v. Webster*, 3 Swab. & T. 106; *Thomas v. Thomas*, 2 Swab. & T. 89; *Bent v. Bent*, 2 Swab. & T. 392; *Boynton v. Boynton*, 2 Swab. & T. 275; *Bell v. Bell*, 1 Swab. & T. 565.

<sup>1</sup> *Jackson v. Jackson*, 1 MacAr. 34.

<sup>2</sup> *Jackson v. Jackson*, 91 U. S. 122. It has since been held that on granting a divorce the court has no power, in the absence of statute, to disturb a valid settlement made before the cause for divorce arose. *Hinds v. Hinds*, 7 Mackey, 85.

<sup>3</sup> See this question in Permanent alimony, § 1027.

**§ 966. Practice in the division of property.**—This is a statutory proceeding for a division of property after a dissolution; and the property should be described and a division prayed for in the petition for divorce.<sup>1</sup> There are some states where the property allotted is called alimony; and it is held that a prayer for division of the property is not necessary, since alimony is a mere incident of a proceeding for divorce.<sup>2</sup>

The award of property is not in a true sense a decree of alimony, but is more in the nature of a final accounting between the parties. After term the court will have no power to revise the decree or change the amount.<sup>3</sup> Such decree is a final judgment, unless it is shown property was omitted by fraud or mistake.<sup>4</sup> To have this effect the decree must show that there was a distribution of the property; and if it appears that alimony was awarded, or personal property only was divided, the decree may be modified.<sup>5</sup> If, after the decree is rendered, the wife discovers other real property not considered by the court in making the award, she may have the decree modified and her proportion of the property increased.<sup>6</sup> The wife may bring a subsequent suit to enforce her rights under the decree, as against the husband and his creditors and grantees.<sup>7</sup>

<sup>1</sup> Howe *v.* Howe, 4 Nev. 469; Ross *v.* Ross, 21 Or. 9, 26 P. 1007, and cases cited.

<sup>2</sup> Twing *v.* O'Mera, 59 Ia. 326. In Georgia the jury may award property to the wife in fee. See Gholston *v.* Gholston, 54 Ga. 285.

<sup>3</sup> Bacon *v.* Bacon, 43 Wis. 197; Webster *v.* Webster, 64 Wis. 438; Kempster *v.* Evans, 81 Wis. 247, 51

N. W. 327; Petersine *v.* Thomas, 28 O. St. 596.

<sup>4</sup> Wright *v.* Wright, 7 Tex. 526.

<sup>5</sup> Blake *v.* Blake, 68 Wis. 303.

<sup>6</sup> Lyon *v.* Lyon, 21 Conn. 185.

<sup>7</sup> Weiss *v.* Bethel, 8 Or. 523; Godey *v.* Godey, 39 Cal. 161; Whetstone *v.* Coffee, 48 Tex. 269; Houston *v.* Timmerman, 17 Or. 499.

## CUSTODY AND SUPPORT OF CHILDREN.

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§ 975. In general.

976. The relative claims of the parents.

977. Custody during suit for divorce.

978. Access to children.

979. Custody where a divorce is denied.

980. Effect of order of custody rendered in another state.

§ 981. Support of children after divorce.

982. Support where decree is silent as to custody.

983. Support where custody awarded to wife.

984. The order for custody and support.

985. When modified.

**§ 975. In general.**—When it has been determined that a divorce will be rendered it becomes necessary to make some order concerning the custody and support of children of the parties. The court granting the divorce is the proper tribunal in which to determine which parent is best qualified to be custodian; for, in hearing the evidence as to the conduct of the parties and the nature and extent of the property owned by each, such court has before it the principal facts which are necessary to enable it to select the best person as a custodian. The statutes confer a broad discretion upon the trial court to make such order as the circumstances require, and in the exercise of this discretion the court is to consult the welfare of the child in every case. The good of the child is paramount to all other considerations, and the court may ignore the greater affection of one party, the common-law right of the father, the agreements of the parties, and, if the circumstances clearly require it, may award the custody to a third person. The agreement of the parties is not binding upon the court, for it is not the

rights of the parents which are to be determined.<sup>1</sup> Yet if the court upon investigation finds the agreement is fair and adequate, it will hesitate to interfere with the wishes of the parties. If such agreement is approved the court may enter an order in conformity with it. If the child has arrived at an age to have an opinion as to which parent will be most suitable, the court may consult the wishes of the child.<sup>2</sup> But the court may ignore the choice of a child where it is the result of prejudice and manifestly against its welfare.<sup>3</sup> In case the child has attained an age of sufficient discretion to enable it to exercise a wise choice, the order will not be made contrary to its wishes.<sup>4</sup> The English courts at one time held that the order for custody and support could only be made until the children arrived at sixteen.<sup>5</sup> The rule of the court of chancery, that at sixteen a child was of sufficient years of discretion to choose its own guardian, was followed, and the custody was awarded until the children arrived at sixteen years of age. From this it was reasoned that a valid order of support for a child over sixteen could not be made, for the maintenance followed the custody. But the true doctrine is that on rendering a decree of divorce the court has a statutory discretion which greatly exceeds that of the court of chancery,<sup>6</sup> and may provide for both the custody and support of the children until they are twenty-one years old.<sup>7</sup> The usual form of the order for support is that a certain person shall have the custody of the children, and a certain sum shall be paid for their support at certain intervals "until the further

<sup>1</sup> Giles *v.* Giles, 30 Neb. 624; D'Alton *v.* D'Alton, 4 P. D. 87; White *v.* White, 75 Ia. 218; Cook *v.* Cook, 1 Barb. Ch. 639; Kremelburg *v.* Kremelburg, 52 Md. 553.

<sup>2</sup> Coffee *v.* Black, 82 Va. 567. In English *v.* English, 31 N. J. Eq. 548, the court allowed a boy of ten years and a girl of eight to select the parent.

<sup>3</sup> Dissenting opinion in Hewitt *v.* Long, 76 Ill. 399.

<sup>4</sup> Reg. *v.* Howes, 3 E. & E. 332.

<sup>5</sup> Mallinson *v.* Mallinson, 1 P. & M. 221; Ryder *v.* Ryder, 2 Swab. & T. 225; Webster *v.* Webster, 31 L. J. P. & M. 184.

<sup>6</sup> Marsh *v.* Marsh, 1 Swab. & T. 312.

<sup>7</sup> Thomassett *v.* Thomassett, 6 Rep. (1894), 637, overruling Blandford *v.* Blandford, 1892 Probate, 148, and citing and discussing the authorities.

order of the court," and in this way the decree may be modified from time to time, whether the statute provides this remedy or not. It is the duty of the court to fix the custody of the children, although the pleadings do not seek such relief.<sup>1</sup>

**§ 976. The relative claims of the parents.**—Upon divorce the parents have equal rights as to the custody of the children, and the welfare of the child will always determine the conflicting claims of the parents. The paramount right of the father to the custody of a child at the common law is in some of the cases admitted to exist, but is said to be subordinate to the best interest of the child.<sup>2</sup> But on decreeing divorce the husband has no paramount right to the custody of his children. The common-law right, if it was an absolute vested right, is terminated by the dissolution of the marriage.<sup>3</sup> The absolute divorce and the discretion of the court to make such order as is just and reasonable concerning the maintenance and custody of the children after the marriage is dissolved were unknown at the common law, and are conditions created by modern statutes. The court has authority under the statute to treat the welfare of the children as the chief consideration, and in the exercise of a sound

<sup>1</sup> *Parker v. Parker*, 8 Ohio Cr. Ct. R. 363.

<sup>2</sup> *Adams v. Adams*, 1 Duv. (Ky.) 167. See *Welch v. Welch*, 33 Wis. 534; *Wand v. Wand*, 14 Cal. 512; *Green v. Green*, 52 Ia. 403; *Lusk v. Lusk*, 28 Mo. 91; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoffman, 497; *Bennett v. Bennett*, 299; *Chetwynd v. Chetwynd*, 1 P. & M. 39; *Cartlidge v. Cartlidge*, 2 Swab. & T. 567. In an early case on granting the wife separate maintenance the chancellor said: "With respect to the children, I do not feel at liberty to take them out of the custody of the father. He is the

natural guardian, invested by God and the law of the country with reasonable power over them. Unless, therefore, his parental power has been cruelly abused, this court would be very cautious of interfering with the exercise of it." Afterwards on proof of the cruelty of the husband, the custody of the children was awarded to the mother. *Prather v. Prather*, 4 Des. 33.

<sup>3</sup> *Giles v. Giles*, 30 Neb. 624; *Hewett v. Long*, 76 Ill. 399; *Green v. Green*, 52 Ia. 403; *Cocke v. Hannum*, 39 Miss. 423, 439.

discretion will choose that parent as custodian who has the best qualifications.<sup>1</sup>

We will now proceed to notice the instances where the good of the child has been held paramount to the valid claims of the parents. Perhaps the most extreme case is where the best interests of the child have required the court to ignore the claims of both parents, and award the custody to a third person who was better qualified than either.<sup>2</sup> The power to award the custody of the children of the parties to a third person is conferred by the ordinary form of the statute relating to the custody of children after divorce.<sup>3</sup> The terms of the statute in some states may contemplate this disposition.<sup>4</sup> The discretion of the court is abused if the custody of a child is awarded to a third person where one of the parties is not manifestly unqualified for the trust.<sup>5</sup> Where the court has the power to award the custody to a third person, a stranger will be allowed to intervene and raise an issue concerning the qualifications of both parents.<sup>6</sup> Where the parties are not of the same faith, the court is not

<sup>1</sup> *Marsh v. Marsh*, 1 Swab. & T. 312; *Boynton v. Boynton*, 2 Swab. & T. 275; *Miner v. Miner*, 11 Ill. 43; *Umlauf v. Umlauf*, 128 Ill. 378, 21 N. E. 600; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Cook v. Cook*, 1 Barb. Ch. 639; *Schichtl v. Schichtl*, 88 Ia. 210, 55 N. W. 309; *Lyle v. Lyle*, 86 Tenn. 372; *Haymond v. Haymond*, 74 Tex. 414; *Adams v. Adams*, 1 Duv. 167; *Corrie v. Corrie*, 42 Mich. 509; *Myers v. Myers*, 83 Va. 806, 6 S. E. 630.

<sup>2</sup> Custody was awarded to grandparents in *Lambert v. Lambert*, 16 Or. 485, 19 P. 459; *Rice v. Rice*, 21 Tex. 58; *Godrich v. Godrich*, 3 P. & M. 134. See, also, *McCarthy v. Hinman*, 35 Conn. 538.

<sup>3</sup> *Chetwynd v. Chetwynd*, 4 Swab. & T. 151.

<sup>4</sup> *In re Laplain* (La. An.), 8 So. 615. This power is denied where the statute provides that the court, upon rendering a decree of divorce, "may make such further judgment as it shall deem just and proper concerning the care, custody and maintenance of the minor children of the parties, and may determine with which of the parties the children, or any of them, may remain, having due regard to the age and sex of such children." *Hopkins v. Hopkins*, 39 Wis. 165, 166, 167.

<sup>5</sup> *Farrar v. Farrar*, 75 Ia. 125.

<sup>6</sup> *Chetwynd v. Chetwynd*, 1 P. & M. 39, 4 Swab. 151; *Godrich v. Godrich*, 3 P. & M. 134; *March v. March*, 1 P. & M. 437.

bound to choose which form of religious training will be for the best interests of the children, but may properly avoid the question by awarding the custody to some suitable person within easy access of both parents.<sup>1</sup> This will leave the children free from the evil effects of the dissensions of their parents. Where the good of the child does not prevent, the custody is generally awarded to the party who obtained the divorce.<sup>2</sup>

Where the parties cohabited during a suit to annul the marriage on account of a prior marriage undissolved, neither of them is an "innocent party" within the meaning of the statute, and the court will not change the custody of the child.<sup>3</sup> A party who is fairly qualified ought not to lose the society of the children because forced to obtain divorce by the misconduct of the other.<sup>4</sup> But the court may in its discretion award the custody to the guilty party if best qualified, for the party obtaining divorce is not entitled to the custody as a matter of right.<sup>5</sup> Ordinarily a mother who has committed adultery will not be permitted to retain her child after divorce.<sup>6</sup> But the guilt of the wife may be overlooked where she is not grossly immoral, if the child is of tender years.<sup>7</sup> In such case the order is only temporary and subject to the further order of the court.

<sup>1</sup> D'Alton v. D'Alton, 4 P. D. 87. Milford v. Milford, 1 P. & M. 715;

<sup>2</sup> Carr v. Carr, 22 Gratt. 168; Bacon v. Bacon, 1 P. & M. 167; Latham v. Latham, 30 Gratt. 307; Skinner v. Skinner, 13 P. D. 90; Welch v. Welch, 33 Wis. 534; Beaucaire v. Lepage, 12 Lower Can. Rep. 81.

Burge, 88 Ill. 164; Wilkinson v. Deming, 80 Ill. 342; Codd v. Codd, 2 Johns. Ch. 141; Lemunier v. Mc-

Cearly, 37 La. An. 133; Klein v. Klein, 47 Mich. 518; Kingsberry v. Kingsberry, 3 Harring. (Del.) 8;

Jeans v. Jeans, 2 Harring. (Del.) 142; Noel v. Noel, 9 C. E. Green, 137; P. v. Mercein, 8 Paige, 47; J.

F. C. v. M. E., 6 Rob. (La.) 135; Boynton v. Boynton, 2 Swab. & T. 275;

<sup>3</sup> Safford v. Safford, 31 Abb. N. C. 73, 27 N. Y. Supp. 640.

<sup>4</sup> Suggate v. Suggate, 1 Swab. & T. 492.

<sup>5</sup> Haskell v. Haskell, 152 Mass. 16.

<sup>6</sup> Helden v. Helden, 7 Wis. 296; Kremelberg v. Kremelberg, 52 Md.

553; Jackson v. Jackson, 8 Or. 402; Uhlman v. Uhlman, 17 Abb. N. Cas. 236.

<sup>7</sup> C. v. Addicks, 5 Binn. 520. The

It is not an absolute rule that one who has committed adultery is morally unfit to have the custody of a child. The circumstances may show repentance or other facts which render a repetition of the offense improbable.<sup>1</sup> And suspicious conduct of the wife will not deprive her of the custody of young children where the husband failed to establish her adultery, and divorce is granted on account of his cruelty.<sup>2</sup>

The fact that a party has deserted may be evidence of a gross marital wrong. But in the ordinary case there are generally some palliating circumstances which, though not sufficient to justify a separation, may disclose that the deserter was not greatly at fault. The mother may in some circumstances be permitted to retain the custody of the children, although she has been guilty of desertion.<sup>3</sup> But the circumstances may justify the court in awarding the custody to the father, where the welfare of the children requires.<sup>4</sup> The mother is preferred as a custodian for children while very young and in need of personal attention and maternal care; and the courts have without exception granted the custody to her, regardless of her former conduct.<sup>5</sup> The necessity of a mother's care does not necessarily cease when the nursing period is over. A delicate and nervous child

custody may be subsequently changed when the child is older. *C. v. Addicks*, 2 S. & R. 174.

<sup>1</sup> See observations in *Cook v. Cook*, 1 Barb. Ch. 639; *Dailey v. Dailey*, Wright, 514; *Williams v. Williams*, 4 Des. 183.

<sup>2</sup> *Brown v. Brown*, 53 Mo. Ap. 453.

<sup>3</sup> *Messenger v. Messenger*, 56 Mo. 329; *Umlauf v. Umlauf*, 128 Ill. 378; *Leavitt v. Leavitt*, Wright, 719; *Luthe v. Luthe*, 12 Colo. 421; *Thiesing v. Thiesing* (Ky.), 26 S. W. 718.

<sup>4</sup> *Luck v. Luck*, 92 Cal. 653, 28 P. 787.

<sup>5</sup> See cases cited above. See, also, *Wagner v. Wagner*, 6 Mo. Ap. 573; *Lyle v. Lyle*, 86 Tenn. 372; *Brown v. Brown*, 53 Mo. Ap. 453; *Johns v. Johns*, 57 Miss. 530. See statute of Michigan in *Klein v. Klein*, 47 Mich. 518, fixing custody of children in mother if children are under twelve years of age. In *Miner v. Miner*, 11 Ill. 48, children at seven or eight were considered of tender years, and in need of

"that tender care which nature requires, and which it is the peculiar province of a mother to supply."

needs a mother's attention and care until years of discretion are reached.<sup>1</sup> But one court has concluded that when a child is three years old, "the tender nursing period has passed by, and the time for moral training and impressions has arrived."<sup>2</sup> This is perhaps an extreme case, as older children are usually awarded to the mother. The best interest of the child is to be determined by the court, and no absolute rule can be given.

As a rule the mother is preferred as a custodian for the daughters, and the sons are awarded to the father, as each parent may have some peculiar advantage in training a child of the same sex.<sup>3</sup> The fact that one or both parties have married again may change this practice, since the question will then be, Which home will be the best for the child?<sup>4</sup> On the death of the parent in custody of the child, the survivor has a right to present his claims to the custody of the child;<sup>5</sup> and the deceased parent has no right to appoint a testamentary guardian.<sup>6</sup> The child remains the ward of the court, and the decree may grant the custody to the survivor on his application.<sup>7</sup>

**§ 977. Custody during suit for divorce.**—The custody of the children of the parties in a suit for divorce is not

<sup>1</sup> See *Reeves v. Reeves*, 75 Ind. 342.

<sup>2</sup> *Carr v. Carr*, 22 Gratt. 168.

<sup>3</sup> See *Greenleaf v. Greenleaf* (S. D.), 61 N. W. 42.

<sup>4</sup> In *Hewitt v. Long*, 76 Ill. 399, the father of the child, a girl of fourteen, applied for a modification of the decree of divorce and for the custody of the child. The mother had allowed the child to remain with her father and mother, the child's grandparents, until her marriage. The father had married, and had the best home and more ample means for the education of the child; but the court reversed the decision of the lower

court and granted the custody to the mother in accordance with the wishes of the child, which was held to have attained sufficient discretion to make an intelligent choice. In both the opinion and the dissenting opinion the relative claims of the parents are considered at great length.

<sup>5</sup> *Schammel v. Schammel*, 105 Cal. 258, 38 P. 729.

<sup>6</sup> *Blackburn, In re*, 41 Mo. Ap. 622; *Davis v. Davis*, 14 P. D. 162. See, under Texas statute, *McKinney v. Noble*, 38 Tex. 195; *S. v. Reuff*, 29 W. Va. 751.

<sup>7</sup> See, *contra*, *Hill v. Hill*, 49 Md. 450.

finally determined until the decree is rendered. The statutes generally provide that when a divorce has been rendered the court may make such order concerning the care, custody and maintenance of the children as from the circumstances of the parties and the nature of the case shall be reasonable and just. This statute, it will be observed, does not give the power to fix the custody of the children while the suit is pending. On the contrary, the power to make *ad interim* orders concerning the custody of children seems to have been excluded by the terms of the statute. But under this form of statute it is held that courts having general chancery jurisdiction over the custody of children may make *ad interim* orders in a suit for divorce.<sup>1</sup> And it is clear that the court, having jurisdiction without the suit for divorce, would not be deprived of jurisdiction by the pendency of such suit on its own docket. It is held the power to make *ad interim* orders may be implied from the general terms of the statute relating to the custody of children on divorce.<sup>2</sup> This construction is not to be approved, however, as the statute contemplates an order made after decree.<sup>3</sup>

The order *ad interim* must be applied for and sustained by some showing. Ordinarily the party having the custody will be allowed to retain it unless some good reason appears why the children should be given to the custody of the applicant.<sup>4</sup> On the hearing of this application the court will act upon the showing, but will not attempt to determine, in advance, the merits of the suit.<sup>5</sup> The application like one for temporary alimony should show probable cause. Where the welfare of the children does not demand immediate change the court will generally, in the exercise of its discretion, permit the party having possession of the children

<sup>1</sup> *In re Morgan*, 117 Mo. 249, 21 S. W. 1122, 22 S. W. 913; *Scoggins v. Scoggins*, 80 N. C. 318; *Gilpin v. Gilpin*, 12 Colo. 504, 21 P. 612.

<sup>2</sup> *In re Morgan, supra.*

<sup>3</sup> See construction of statute permitting *ad interim* orders. Put-

nam *v. Putnam*, 3 Code R. 122; *P. v. Paulding*, 15 How. Pr. 167; *Green v. Green*, 52 Ia. 403.

<sup>4</sup> *Day v. Day*, 4 Misc. 235, 24 N. Y. Supp. 873.

<sup>5</sup> *Ryder v. Ryder*, 2 Swab. & T. 225.

to retain it during the suit and grant the other party reasonable access from time to time.<sup>1</sup>

Other courts will not interfere by *habeas corpus* or otherwise to fix the custody of a child when the court having jurisdiction of the parties in the divorce suit has made an order for the temporary custody of the children pending the suit for divorce.<sup>2</sup> The welfare of the child and its future support are so dependent upon the result of the suit that the pendency of the suit should deprive other courts from interfering in the matter.<sup>3</sup> The power to make a temporary order for custody pending suit includes the power to make a similar order while the suit is pending on appeal.<sup>4</sup>

**§ 978. Access to children.**—The court usually grants the custody to one party and allows the other party reasonable access to the child.<sup>5</sup> The parent deprived of custody has no absolute right to access to the children, as the court may refuse the same for the best interest of the child. This power will be rarely exercised. The practice once was to deny an adulteress all access to her children.<sup>6</sup> But it is now conceded to be within the discretion of the court, and the feelings of the guilty party are now considered.<sup>7</sup> In fact it is better for the child to be acquainted with both parents,

<sup>1</sup> *Day v. Day*, 4 Misc. 235, 24 N.Y. Supp. 873; *Boynton v. Boynton*, 1 Swab. & T. 324; *Thompson v. Thompson*, 2 Swab. & T. 402; *Curtis v. Curtis*, 1 Swab. & T. 75.

<sup>2</sup> *In re Morgan* (Mo.), *supra*.

<sup>3</sup> *In re Delano*, 37 Mo. Ap. 185. But other courts have interfered on the ground that before a divorce is rendered the court has no power to make a temporary order concerning the custody of the children. *Ex parte De Angelis*, Edmond's Sel. Cas. 476.

<sup>4</sup> In *King v. King*, 42 Mo. Ap. 454, such order is said to be void, as interfering with the jurisdiction of the appellate court.

<sup>5</sup> *Haley v. Haley*, 44 Ark. 429; *Campbell v. Campbell*, 37 Wis. 206; *Oliver v. Oliver*, 151 Mass. 349; *Bailey v. Bailey*, 17 Or. 114. 19 P. 844; *Hill v. Hill*, 49 Md. 450. The failure to allow a party access is not error. The remedy is to apply for a modification of the decree in this respect. *Burge v. Burge*, 88 Ill. 165.

<sup>6</sup> *Seddon v. Seddon*, 2 Swab. & T. 640; *Clout v. Clout*, 2 Swab. & T. 391.

<sup>7</sup> *Taylor v. Taylor*, 29 L. J. (P. & M.) 150; *Symington v. Symington*, L. R. 2 Sc. & D. 415.

and the court will not permit one parent to prejudice the child against the other. Access will be denied where it is shown that it is abused by causing dissensions in the family and arousing discontent in the child.<sup>1</sup>

It is the policy of our courts to permit both parents to have access to the children, and for this reason the order may provide that the child shall not be removed beyond the jurisdiction of the court or out of the state.<sup>2</sup> But where it is urged that one party, otherwise a proper custodian, will remove the child to another state, such person has been granted the custody.<sup>3</sup> The advisability of permitting one parent to remove the child to another state is a matter clearly within the jurisdiction of the court, and, like all questions relating to mutual claims of the parents, must be determined by the best interests of the child.<sup>4</sup>

**§ 979. Custody where a divorce is denied.**—Under statutes granting power to fix the custody of children where a divorce is rendered, or “during the pendency of the cause,

<sup>1</sup> *Handley v. Handley*, 1 Probate (1891), 124.

<sup>2</sup> *Hewitt v. Long*, 76 Ill. 399; *Umlauf v. Umlauf*, 35 Ill. Ap. 624; *Eckard v. Eckard*, 29 Neb. 457; *Ryce v. Ryce*, 52 Ind. 64; *Miner v. Miner*, 11 Ill. 43; *Clarke, In re*, 17 Jur. 362, 17 Eng. Law & Eq. 599; *Dawson v. Jay*, 2 Eng. Law & Eq. 451. See criticism of English authorities in *Hewitt v. Long, supra*, in dissenting opinion.

<sup>3</sup> *Adams v. Adams*, 1 Duv. 167; *Bullen, In re*, 28 Kan. 781. There is a *dictum* that there is no authority to prevent the parent from removing the child from the state and that the court retains jurisdiction to change the custody of the child after the removal. “On any proper process for a change, she is bound, wherever she may be, to take notice, though she may

not personally be within the jurisdiction of the court; the subject-matter is such that the judgment of the court will be valid and binding upon her, and by the constitution of the United States may be enforced against her, though in another state.” *Stetson v. Stetson*, 80 Me. 483, 15 A. 60.

<sup>4</sup> Where a decree of divorce awards the custody to one party and does not prohibit a removal from the state, but grants access to the other party, the inference is that the child shall remain where both parties then reside. *Campbell v. Campbell*, 37 Ill. 206. But a removal will not place the party in contempt of court where the interests of the child are thereby promoted. *Id.* Such removal does not give the other party a right to obtain the custody of the child.

or at its final hearing, or afterwards," it has been held that the courts have no authority to fix the custody of the children where a divorce is denied.<sup>1</sup> It is said that this jurisdiction is purely statutory, and such relief must be refused because it is not provided for in the statute. But it is not denied that the court has jurisdiction to fix the custody in a subsequent proceeding by *habeas corpus*, and it seems useless to deny the relief in a divorce and grant it in another suit for the same purpose in states where the different forms of action are abolished. When the parties are before the court and their domestic affairs have been the subject of judicial investigation, it would seem to be the proper time to adjudicate the rights of the parents to the custody of the children, as the court has jurisdiction of the parties and the subject-matter. In some states this relief will be granted where divorce is denied.<sup>2</sup> But the court may in its discretion refuse to make any order concerning the children if the circumstances do not require it.<sup>3</sup> The good of the child determines the custody where a divorce is denied, and the same considerations will influence the discretion of the court.<sup>4</sup>

**§ 980. Effect of order of custody rendered in another state.**—An order of custody rendered in another state by a court having jurisdiction over both parents is valid and binding as to their rights to the children. Such order is not, however, *res judicata* as to the right of the state to determine the custody of the child. The decree of another state may be binding as to the parties, but the courts of each state will have the right to determine anew who shall be entitled to the custody of the child,<sup>5</sup> and where its welfare requires, the courts of the latter state may commit the

*Joab v. Sheets*, 99 Ind. 329. It is, however, a circumstance in his favor. <sup>3</sup> *Brenot v. Brenot*, 102 Cal. 294, 36 P. 672.

<sup>1</sup> *Davis v. Davis*, 75 N. Y. 221; 479. <sup>4</sup> *Cornelius v. Cornelius*, 31 Ala.

*Keppel v. Keppel* (Ga.), 17 S. E. 976. <sup>5</sup> *Kentzler v. Kentzler*, 3 Wash.

<sup>2</sup> See *Luck v. Luck*, 92 Cal. 653, 28 P. 370.  
28 P. 787.

child to the custody of a third person.<sup>1</sup> Where a wife obtained a decree of divorce from the husband in Illinois, and the husband, after having answered in the case, left the state and removed the children to New York to avoid the decree of the court, on *habeas corpus* by the wife to obtain the possession of the children it was held that the Illinois decree awarding the wife the custody of the children did not operate as an estoppel, but only as a fact bearing on the discretion of the court in arriving at a proper custody of the children in the circumstances of the case.<sup>2</sup> In these cases the right of the state to change the guardian or custodian is recognized. But in other decisions it is held that the order of a court having jurisdiction over the child is *res adjudicata* as to all parties, and the power to change the custody of the child is never lost although the parents and child leave the state.<sup>3</sup> And all applications to change the decree must be made to the court granting the order.<sup>4</sup>

It is clear that a decree based upon constructive service is void for lack of jurisdiction so far as it attempts to fix the custody of a child residing with the defendant in another state.<sup>5</sup> It is not *res adjudicata* as to the defendant or as to the interest of the state in which the child resides. But a valid order may be made where the child is within the state although the defendant is a non-resident and is served by publication.<sup>6</sup> In such case the court had jurisdiction to determine the custody of the child as well as the *status* of the plaintiff, the jurisdiction being obtained by the same process. The court in which the divorce is rendered may fix the custody of children although they are residing in another state. The order in such case is an adjudication of

<sup>1</sup> *In re Bort*, 25 Kan. 308.

<sup>4</sup> *Id.*; *Baily v. Schrader*, 34 Ia.

<sup>2</sup> *P. v. Allen*, 105 N. Y. 628, affirming 40 Hun, 611; *Thorndyke v. Rice*, 24 L. Rep. 19.

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<sup>5</sup> *Kline v. Kline*, 57 Ia. 386; *Harris v. Harris* (N. C.), 20 S. E. 187.

<sup>3</sup> *Stetson v. Stetson*, 80 Me. 483; *Wakefield v. Ives*, 35 Ia. 238.

<sup>6</sup> *Wakefield v. Ives*, 35 Ia. 238.

the rights of both parties where there is personal service upon the defendant.<sup>1</sup>

**§ 981. Support of children after divorce.**—The statute confers a discretionary power upon the courts to require either the husband or the wife to support their children until majority. This power is greater than that of any court previously existing in England.<sup>2</sup> Courts of equity could order children to be maintained out of their own property, but not otherwise. Such courts could not compel the husband to support his children.<sup>3</sup> The father was liable to others for their support where he both deserted and neglected them, but not while they remained with him. It is a rule of the common law that the duty of support follows the right of custody. But this rule, though based upon reasons that still survive, may be disregarded by the court and the support may be ordered against one who is not entitled by the decree to the custody of the children. It would seem that where the *status* of married women has been so changed by the statute that they may acquire, own and control their own separate property, they should support the children awarded to them by the decree. If the wife has no property and the husband has, the decree should award her sufficient property to enable her to support the children awarded her. Experience has shown that an order for support, payable in instalments, is like a decree for alimony in instalments, an onerous burden and difficult to enforce. The duty of support will be best performed where the means are furnished directly by the parent instead of sums of money paid to one who has ceased to be a wife or an object of affection.

When the marriage is dissolved it is clear that the duty of the parents to maintain them after divorce remains as before, for children are not parties to the divorce suit and lose no rights thereby. After divorce the parents become

<sup>1</sup> Avery *v.* Avery, 33 Kan. 1.

<sup>3</sup> Thomassett *v.* Thomassett, 6

<sup>2</sup> Marsh *v.* Marsh, 1 Swab. & T. Rep. (1894), 637.  
312; Spratt *v.* Spratt, 1 Swab. & T.  
215.

in law as strangers to each other, except as provided in the decree. The liability of the husband to the divorced wife is therefore the same as it would be to a third person who had furnished necessaries to the children, with the exception that the wife is under some obligation to support her own children. At the common law the husband was primarily liable for the support of his minor children.<sup>1</sup> But the reasons for the common law do not obtain where the statute has changed the rights of married women to such an extent as to permit her to own and control separate property. It would seem that her duty, after a divorce which makes no order concerning the custody and support of the children, would be to contribute to their support according to her means. This is intimated in some of the cases.<sup>2</sup> The rule appears to be that he is liable to her for their support after divorce.<sup>3</sup> But the effect of the statute relating to married women renders this an open question.<sup>4</sup>

When the divorce is granted it is the duty of the court to prevent all questions as to support by fixing the liability in the decree. And this may be done although there is no reference to the children in the pleadings.<sup>5</sup> The amount of the support necessary for the children is to be equal to what they would have received if a divorce had not been rendered, and is dependent upon the circumstances of the parties.<sup>6</sup> A suitable allowance may be made for the education of the

<sup>1</sup> Reynolds *v.* Sweetzer, 15 Gray, 78; Kimball *v.* Keyes, 11 Wend. 33; Walker *v.* Leighton, 11 Fost. (N. H.) 111; Gill *v.* Read, 5 R. I. 343; Bazeley *v.* Forder, L. R. 3 Q. B. 559; Atkyns *v.* Pearce, 2 C. B. (N. S.) 763; Baldwin *v.* Foster, 138 Mass. 449.

<sup>2</sup> Harris *v.* Harris, 5 Kan. 46; Lapworth *v.* Leach, 79 Mich. 17;

Pawling *v.* Wilson, 13 Johns. 192.

<sup>3</sup> Stanton *v.* Wilson, 3 Day, 37.

<sup>4</sup> See dissenting opinion in Pierce *v.* Pierce, 64 Wis. 73. A divorced

wife, who is also guardian for her children, is personally liable for the care and education of her children, although she contract for the same as their guardian. Aldrich *v.* More, 5 N. Y. Supp. 330.

<sup>5</sup> Snover *v.* Snover, 10 N. J. Eq. 261; Morgan. *In re*, 117 Mo. 249, 21 S. W. 1122; Gordon, *Ex parte*, 95 Cal. 374, 30 P. 561.

<sup>6</sup> Wuest *v.* Wuest, 17 Nev. 217; Webster *v.* Webster, 3 Swab. & T. 106; Plaster *v.* Plaster, 53 Ill. 445; Id., 67 Ill. 93.

children.<sup>1</sup> If the court has made no provision for custody and support in the decree, or has granted the custody to the wife without provision for their support, the provision may be afterwards made upon petition or motion and notice to the husband.<sup>2</sup> Where the statute provides that the court shall have power to modify the order at any time after the decree, it is clear that the court granting the order of custody will retain jurisdiction not only as to questions of custody, but also as to support, and a wife cannot maintain an action in another court to recover the expense of keeping the children. Her only remedy is to apply to have the order modified by the court which granted it.<sup>3</sup> And upon the hearing the court may render complete justice and order the husband to pay for past support.<sup>4</sup> The power to grant relief as to support already furnished is doubtful. The support without decree should be presumed voluntary unless the circumstances show an agreement for compensation.<sup>5</sup> The amount of the allowance should be stated separately and not included in the sum allowed as alimony.<sup>6</sup> For where alimony is allowed and the decree is silent as to the maintenance of the children, it is held that the alimony is for the wife alone.<sup>7</sup> The property of the parties cannot be set apart except as maintenance for the children during their minority.<sup>8</sup> The ordinary form of the statute directing a provision

<sup>1</sup> *Heninger v. Heninger* (Va.), 18 S. W. 193.

<sup>2</sup> *Wilson v. Wilson*, 45 Cal. 399; *Plaster v. Plaster*, 47 Ill. 290; *Holt v. Holt*, 42 Ark. 495; *Buckminster v. Buckminster*, 38 Vt. 248; *King v. Miller* (Wash.), 38 P. 1020; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Washburn v. Catlin*, 97 N. Y. 623.

As to power under revised code see *Wells v. Wells*, 10 N. Y. St. Rep. 248; *Chamberlain v. Chamberlain*, 17 N. Y. Supp. 578.

<sup>3</sup> *McNees v. McNees* (Ky.), 30 S. W. 207.

<sup>4</sup> *Plaster v. Plaster*, *supra*; *Holt v. Holt*, *supra*; and *Washburn v. Catlin*, *supra*.

<sup>5</sup> *Chester v. Chester*, 17 Mo. Ap. 657.

<sup>6</sup> *Johnson v. Johnson*, 36 Ill. Ap. 152; *Zuver v. Zuver*, 36 Ia. 190; *Wheildon v. Wheildon*, 2 Swab. & T. 388.

<sup>7</sup> *Pretzinger v. Pretzinger*, 45 O. St. 452; *Rogers v. Rogers* (Ohio), 36 N. E. 310; *Richmond v. Richmond*, 1 Green Ch. 90; *Foote v. Foote*, 22 Ill. 425; *Dow v. Dow*, 38 N. H. 188.

<sup>8</sup> *Fitch v. Cornell*, 1 Saw. 156.

for the support does not confer the power to transfer property to the wife to be held in trust for the children.<sup>1</sup> The wife may be compelled by the decree to support the children after divorce.<sup>2</sup> The court in estimating the amount of alimony should consider the rights of the children as paramount, and may refuse alimony for the reason that the husband's income is sufficient for the support of the children only. The custody of the children may be withheld from her by the terms of the decree until she undertakes to comply with what is just. In the absence of statute it is held that the court has no power to compel the husband to secure the payment of the maintenance.<sup>3</sup> But the term "such order as may be just and proper" is broad enough to authorize a court to exercise its discretion as to the security to be given.<sup>4</sup>

**§ 982. Support where decree is silent as to custody.**—If the decree is silent as to the custody of the children, the liability of the father to the divorced wife for the support of the children is the same as his liability to any other stranger. For upon divorce the obligations of marriage are canceled and the parties become as other strangers. Where the father neither refuses nor neglects to furnish his children with necessaries, a stranger cannot supply them at his charge.<sup>5</sup> But he will be liable to a third person for necessities furnished to his children if he neglects or deserts them.<sup>6</sup> It is therefore clear that if the divorced wife sup-

<sup>1</sup> Simpson *v.* Simpson, 80 Cal. 237. But see *contra*, Doscher *v.* Blackiston, 7 Or. 403.

<sup>2</sup> See form of statute set out in Cheever *v.* Wilson, 9 Wall. (U. S.) 124; Seatel *v.* Seatel, 4 Swab. & T. 230.

<sup>3</sup> Hunt *v.* Hunt, 8 P. D. 161.

<sup>4</sup> A decree awarding custody of the children to the wife and compelling the husband to support the children until the further order of the court is not discharged by his death, and a surety on his bond to

secure the payment of the maintenance is not thereby released. Miller *v.* Miller, 64 Me. 484.

<sup>5</sup> Gotts *v.* Clark, 78 Ill. 239; Rogers *v.* Turner, 59 Mo. 116.

<sup>6</sup> Dennis *v.* Clark, 2 Cush. 252; Parson on Contracts, 252, 254; Gordon *v.* Potter, 17 Vt. 348, approved by Tyler on Infancy, § 65; Stanton *v.* Wilson, 3 Day (Conn.), 37; Weeks *v.* Merrow, 40 Me. 151; Gill *v.* Read, 5 R. I. 343; Rumney *v.* Keyes, 7 N. H. 571. While this is a much disputed question, it seems to be most

ports the children without a decree giving her the custody of them, the husband is liable to her for their maintenance under a contract implied by the law.<sup>1</sup> But if the husband obtains divorce because the wife has left him, and she retains the custody of their child, and the decree is silent as to its custody and support, no contract to pay for its support will be implied.<sup>2</sup> This is perhaps the true doctrine of our unwritten law. There are some authorities which hold the husband liable to the wife for the support of the children where the decree is silent as to custody and support, on the ground that his obligation continues and is not discharged by divorce.<sup>3</sup> These cases do not discuss the *status* of divorced parties or the presumption that the support was voluntary. It is admitted by all that the liability of the husband is not discharged by divorce, but the principle overlooked is his liability to the wife, which, after divorce, is no greater than his liability to any other person.

**§ 983. Support where custody awarded to wife.**—The father is not liable for the support of his children where the decree has granted the custody of the children to the wife and contains no provision for their support.<sup>4</sup> There are several reasons for this. The statute having made it the duty of the court to provide for the custody and maintenance of the children on divorce, it will be presumed that the decree has made all the provision that was necessary. The decree is conclusive as to the mutual rights and obligations of the parties, subject to the right to have such decree modified as subsequent exigencies may require. The divorce makes the parties strangers. The father is not liable

in accord with established principles of law to hold the husband liable only when he casts his children upon the mercy of others, otherwise the stranger, and not the parent, can choose what seems best for the child.

<sup>1</sup> *Gilley v. Gilley*, 79 Me. 292; *Maddox v. Patterson*, 80 Ga. 719.

<sup>2</sup> *Fitler v. Fitler*, 33 Pa. 50.

<sup>3</sup> *Buckminster v. Buckminster*, 38 Vt. 248; *Courtright v. Courtright*, 40 Mich. 633; *Holt v. Holt*, 42 Ark. 495; *Lusk v. Lusk*, 28 Mo. 91; *Chester v. Chester*, 17 Mo. Ap. 657.

<sup>4</sup> *Harris v. Harris*, 5 Kan. 46; *Chandler v. Dye*, 37 Kan. 765, 15 P. 925.

to a stranger who furnishes the children with necessaries unless under such circumstances that a contract will be implied.<sup>1</sup>

Thus in a recent case the wife was denied remuneration for the support of a child where she had been awarded the custody of the child and the decree was silent as to its support. The husband had obtained a decree of absolute divorce, and the wife had not appealed from that portion of the decree awarding her the custody of the child without providing for its support. Nor had she moved for a modification of the decree in this respect. It was said, "the law presumes that every question involved in the action in which the judgment was rendered — and the right of the plaintiff to an allowance for the maintenance of the child was one of those questions — was passed on by the court, and that the claim for such maintenance was decided adversely to the plaintiff."<sup>2</sup> Accordingly it is held that the divorced husband is not liable to his divorced wife for necessaries furnished a child in her custody unless by agreement express or implied.<sup>3</sup> Under such circumstances her support is the voluntary performance of a natural duty.<sup>4</sup> Her remedy was to apply for maintenance for the children when the divorce was rendered and the custody awarded to her. Even where the husband obtains a divorce and the custody of the children is awarded to the wife, the court must make some order for the support of the children. Where the wife is without sufficient means it is error to make no order concerning the maintenance of the children.<sup>5</sup>

<sup>1</sup> See *Shelton v. Springett*, 11 C. B. 452, 20 Eng. Law & Eq. 283; *Gordon v. Potter*, 17 Vt. 348; *White v. Mann*, 110 Ind. 74; *Schouler, Dom. Rel.*, § 241; *Kelly v. Davis*, 49 N. H. 186; *Porter v. Powell*, 79 Ia. 151. See, also, *Finch v. Finch*, 22 Conn. 412, as modified by Welch's Appeal, 43 Conn. 342.

<sup>2</sup> *Rich v. Rich*, 88 Hun, 566, 34 N. Y. Supp. 854.

<sup>3</sup> *Ramsey v. Ramsey*, 121 Ind. 215, 23 N. E. 69; *Cushman v. Hassler*, 82 Ia. 295, 47 N. W. 1036; *Burritt v. Burritt*, 29 Barb. 124.

<sup>4</sup> *Fulton v. Fulton (Ohio)*, 39 N. E. 729.

<sup>5</sup> *Tuggles v. Tuggles (Ky.)*, 30 S. W. 875.

Another reason for relieving the husband from liability for the support of the children, where the custody is awarded to the wife, is that he has no longer the right to take the child and support it himself or to employ others to support it.<sup>1</sup> While the wife has custody of the children by virtue of a decree of divorce the husband is not entitled to their services, and is therefore not liable for their maintenance; for the custody of the child and the obligation of support are reciprocal rights and obligations.<sup>2</sup> Where the custody of the child is awarded to the mother, the presumption is that the court granted all the relief that the circumstances required, and if the wife desired the husband to support the child her remedy was to have the decree amended by a further order for the support of the child.<sup>3</sup> It is a question which might have been litigated at the time the custody was awarded.

The above reasons are sometimes overlooked, and it is held the decree awarding the custody to the wife does not impair the obligation of the husband to support his children, and therefore he is liable for their support while in her custody, regardless of whether there is a contract for their support either express or implied.<sup>3</sup>

The leading case which holds the father liable, where the wife is allowed alimony and the custody of the children, assigns as a reason for such holding that upon divorce the attitude of the husband is the same towards his children as though he had deserted them. The court approves the doctrine that, if a minor is forced into the world by cruelty or improper conduct of the father, necessaries may be supplied and the value thereof may be recovered from the parent. "There is evidently no satisfactory reason," said the court, "for changing the rule of liability when, through ill-treatment or other breach of marital obligation, the husband

<sup>1</sup> Brow *v.* Brightman, 136 Mass. 187. Conn. 410; Hancock *v.* Merrick, 10 Cush. 41.

<sup>2</sup> Husband *v.* Husband, 67 Ind. 583; Johnson *v.* Onstead, 74 Mich. 437, 42 N. W. 62; Finch *v.* Finch, 23 <sup>3</sup> Burritt *v.* Burritt, *supra*. <sup>4</sup> Plaster *v.* Plaster, 47 Ill. 290; Conn *v.* Conn, 57 Ind. 323.

renders it necessary for a court of justice to divorce the wife and commit to her the custody of her minor children. If under such circumstances, upon the allowance of alimony with custody of children, the court omits to make an order for the children's maintenance, the father's natural obligation to support is of none the less force. The duty of support is not evaded by the husband's so conducting himself as to render it necessary to dissolve the bonds of matrimony and give to the mother the care and custody of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties; or to enable the father to convert his own misconduct into a shield against parental liability.”<sup>1</sup> This reasoning can only apply where the husband is at fault and the decree is silent as to his liability.

But where the divorce is rendered on account of the misconduct of the wife the reasons do not apply. The wife, if given the custody of the children, assumes the obligations incident to such custody. “If under these circumstances, where her own misconduct has destroyed the family relation and deprived the father of the custody and society of his children, she has in fact maintained her children, she has no claim, either legal or moral, to demand reimbursement from the father.”<sup>2</sup>

**§ 984. The order for custody and support.**—It is the duty of the court, on granting a divorce, to protect the interest of the state by providing for the custody and support of the children, although there is no prayer for such relief.<sup>3</sup> The support of the children is paramount to any right of the wife to alimony or a division of the property, and should therefore be first calculated and deducted from the income of the husband. The order should provide that a certain

<sup>1</sup> *Pretzinger v. Pretzinger*, 45 729, approving *Dedham v. Natick*, O. St. 452, 15 N. E. 471, approved in 16 Mass. 135, and *Schouler, Dom.*

<sup>2</sup> *Bishop, Mar., Sep. & Div.*, § 1223. Rel., § 293.

For petition in this case see § 757.      <sup>3</sup> § 975.

<sup>2</sup> *Fulton v. Fulton* (Ohio), 39 N. E.

parent or person shall have the custody of the children until the further order of the court, and that the other party shall have reasonable access to the children at certain times; that the husband or wife shall pay to the custodian or a third person<sup>1</sup> a certain amount annually or monthly for the support of the child. The order may require security for the payments of this support. And if the interests of the children require, the court may order the child to be kept in a certain place.<sup>2</sup> The order may be enforced by *habeas corpus* or by proceedings in contempt.<sup>3</sup> Or the party entitled to custody may take the child from the other by the use of reasonable force.<sup>4</sup> This order is a final order and is subject to review under general statutes relating to appeal. But in some states the order is said to be an incident of the decree of divorce and not subject to separate review.<sup>5</sup> In New York it is a discretionary order not subject to review on appeal.<sup>6</sup>

**§ 985. When modified.**—The order awarding the custody of children may be changed on subsequent application of the parties.<sup>7</sup> This power is statutory, and gives the court power to vary the order for custody and support from time to time as the welfare of the children may require.<sup>8</sup> The order of the court upon a decree of divorce is binding upon the parties as an adjudication of their rights and as to the

<sup>1</sup> An order to pay to a person not a party to the suit is not void on this account. *Gordon, Ex parte*, 95 Cal. 374, 30 P. 561. But see *contra*, *Schammel v. Schammel*, 105 Cal. 258, 38 P. 729.

<sup>2</sup> May require the child to be kept in another county. *Luck v. Luck*, 92 Cal. 653.

<sup>3</sup> *Ex parte Gordon*, 95 Cal. 374, 30 P. 651; *Nicholls v. Nicholls*, 3 Duer, 642; *Buck v. Buck*, 60 Ill. 105.

<sup>4</sup> *Monjo v. Monjo*, 6 N. Y. Supp. 132.

<sup>5</sup> *Thompson v. Thompson*, 5 Utah, 401, 16 P. 400; *Rogers v. Rogers* (O.),

36 N. E. 310. But see *contra*, *Irwin v. Irwin* (Ky.), 28 S. W. 664; *Evans v. Evans* (Ky.), 20 S. W. 605.

<sup>6</sup> *Price v. Price*, 55 N. Y. 656; *Warring v. Warring*, 100 N. Y. 570.

<sup>7</sup> *Umlauf v. Umlauf*, 35 Ill. Ap. 624; *Umlauf v. Umlauf*, 27 Ill. Ap. 375; *Cowls v. Cowls*, 3 Gilman, 435; *Harvey v. Lane*, 66 Me. 536; *Chandler v. Chandler*, 24 Mich. 176; *Flory v. Ostrom*, 92 Mich. 622, 52 N. W. 1038.

<sup>8</sup> *Ahrenfeldt v. Ahrenfeldt*, 4 Sandf. Ch. 493. See *contra*, *Crimmins v. Crimmins*, 64 How. Pr. 103, 28 Hun, 200.

welfare of the child at the time the order was made. The power of the court to vary the order deprives other courts of the power to determine the custody in another proceeding; for the divorce court becomes in effect the ward of the child, and all applications must be made to this court.<sup>1</sup> Other courts in the same state have no jurisdiction to vary the order, even if the circumstances would justify it.<sup>2</sup> There is a *dictum* that the court granting divorce is the only court which can vary the order where the parties and the child are in another state.<sup>3</sup> But it seems that the courts of other states having jurisdiction over the parties will proceed to fix the custody of the child as its welfare requires, regardless of former adjudications. Where the divorce court has made no decree concerning the children, other courts may fix the custody upon evidence of the fitness of the parents.<sup>4</sup> But the safest course is to apply to the court granting the divorce.<sup>5</sup>

<sup>1</sup> Hoffman *v.* Hoffman, 15 O. St. 427; Williams *v.* Williams, 13 Ind. 523; McNees *v.* McNees (Ky.), 30 S. W. 207.

<sup>2</sup> Jordan *v.* Jordan, 4 Tex. Civ. 559, 23 S. W. 581; Baily *v.* Schrader, 34 Ind. 260; Shaw *v.* McHenry, 52 Ia. 182; Leming *v.* Sale, 128 Ind. 317, 27 N. E. 619; Sullivan *v.* Learned, 49 Ind. 252; Bennett *v.* Southard, 35 Cal. 688; Jennings *v.* Jennings, 56 Ia. 288.

<sup>3</sup> Stetson *v.* Stetson, 80 Me. 483.

<sup>4</sup> Cocke *v.* Hannum, 39 Miss. 423.

<sup>5</sup> Cook *v.* Cook, 1 Barb. Ch. 639; Bush *v.* Bush, 37 Ind. 164; Barney *v.* Barney, 14 Ia. 189; Miner *v.* Miner, 11 Ill. 43; Logan *v.* Logan, 90 Ind. 107; Landis *v.* Landis, 10 Vroom, 274; Deeds *v.* Deeds, 1 G. Greene, 394; Jungk *v.* Jungk, 5 Ia. 541; Andrews *v.* Andrews, 15 Ia. 423; Laurie *v.* Laurie, 9 Paige (N. Y.), 284; Collins *v.* Collins 2 Paige, 9; Rogers *v.* Rogers (Ohio), 36 N. E. 310; Neil *v.* Neil, 38 O. St. 558; Phillips *v.* Phillips, 24 W. Va. 591; Paff *v.* Paff, Hopkins, 584. The power to vary this order was denied in the absence of any statutory authority in England. Robotham *v.* Robotham, 1 Swab. & T. 190; Seymour *v.* Seymour, 1 Swab. & T. 332; Curtis *v.* Curtis, 1 Swab. & T. 192; Suggate *v.* Suggate, 1 Swab. & T. 492. But this authority was subsequently conferred and the courts have interpreted the revised statute in several instances. D'Alton *v.* D'Alton, 4 P. D. 87; Milford *v.* Milford, 1 P. & M. 715; Hyde *v.* Hyde, 18 P. D. 166. See, also, cases where custody was awarded. Ryder *v.* Ryder, 2 Swab. & T. 225; Cooke *v.* Cooke, 3 Swab. & T. 248; Seddon *v.* Seddon, 2 Swab. & T. 640; Bacon *v.* Bacon, 1 P. & M. 167.

It is held in California that the power of the court to modify an order for the custody of a child is lost when the parent having custody has permitted another to adopt the child by regular proceedings in another court. It is held that the proceedings for adoption are *in rem*, and binding on both divorced parties, so that the court rendering divorce loses jurisdiction over the child, and can make no further order concerning it.<sup>1</sup>

The facts which will justify a change of custody must be essentially different from those presented to the court which rendered the decree.<sup>2</sup> Facts known to the applicant before the decree of divorce was rendered cannot be shown to obtain the custody of the children.<sup>3</sup> But facts which could not have been discovered with reasonable diligence before the decree may be shown in a supplemental proceeding to change the order.<sup>4</sup> Ordinarily, the fact that the parent having custody of the child has married again will not be a sufficient circumstance to justify a change of custody,<sup>5</sup> but will be sufficient if the welfare of the child requires.<sup>6</sup> Cruelty of the parent and a disposition to require too much labor of the children to the neglect of their education,<sup>7</sup> or attempts to estrange the child from the other parent, have been held insufficient.<sup>8</sup> Where, at the time the divorce was rendered, the child was of tender years and needed the attention of its mother, it may be shown that the child is no longer in need of a mother's care, and that other considerations will render the custody of the father for the best interests of the child.<sup>9</sup> The failure to educate the children may justify a change.<sup>10</sup>

<sup>1</sup> Younger *v.* Younger (Cal.), 39 P. 778.

<sup>5</sup> Wand *v.* Wand, 14 Cal. 512.

<sup>2</sup> White *v.* White, 75 Ia. 218; Reid *v.* Reid, 75 Ia. 681; S. *v.* Bechdel, 37 Minn. 360; Teter *v.* Teter, 88 Ind. 494; Pfau *v.* Pfau, 8 Ohio Cir. Ct. R. 87; Irwin *v.* Irwin (Ky.), 30 S. W. 417.

<sup>6</sup> Welch *v.* Welch, 33 Wis. 534.

<sup>3</sup> Dubois *v.* Johnson, 96 Ind. 6.

<sup>7</sup> Boggs *v.* Boggs, 49 Ia. 190.

<sup>4</sup> Semrow *v.* Semrow, 23 Minn. 214.

<sup>8</sup> Sherwood *v.* Sherwood, 56 Ia. 608; D'Alton *v.* D'Alton, 4 P. D. 87.

<sup>9</sup> Valentine *v.* Valentine, 4 Halst. Ch. 219; Oliver *v.* Oliver, 151 Mass. 349.

<sup>10</sup> Snover *v.* Snover, 13 N. J. Eq. 261.

It will be sufficient to show that the parent has become dissolute, or has committed adultery, or is otherwise immoral and likely to have a bad influence upon the child.<sup>1</sup> In general, it may be said that any new circumstances which were not before the court when the order was made will be sufficient if they show clearly that the welfare of the child requires a change of custody.<sup>2</sup>

The amount awarded for the maintenance of the children is likewise subject to the modification of the court. In this respect the order resembles a decree for alimony, and is subject to the further order of the court as the changed circumstances of the parties may require.<sup>3</sup> The husband will be relieved of the order for support where the necessity no longer exists, as where the children are old enough to support themselves by their own earnings, or where the wife has acquired ample means since the order was entered.<sup>4</sup>

<sup>1</sup> *Witt v. Witt*, 1891 Probate, 163. port be diverted. *Lancaster v.*

<sup>2</sup> *Flory v. Ostrom*, 92 Mich. 622, Lancaster, 29 Ill. Ap. 510. 52 N. W. 1038. The order may be upon the condition that the husband shall be entitled to the child if the amount ordered for its sup-

<sup>3</sup> See Power to change the amount of permanent alimony, § 934.

<sup>4</sup> *Greenleaf v. Greenleaf* (S. D.) 61 N. W. 42.

## ALIMONY WITHOUT DIVORCE.

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§ 1000. In general.

1001. The question as affected by statute.

§ 1002. When maintenance is granted.

1003. The procedure.

**§ 1000. In general.**—It is a controverted question whether in the absence of statute a court of equity has jurisdiction to decree separate maintenance to the wife where the husband, having sufficient means, has failed or refused to support her. This question has been disposed of in some states by treating the wife's suit for separate maintenance as a suit for alimony, and holding that alimony is always an incident to a proceeding for divorce, and therefore such relief cannot be granted in a direct proceeding.<sup>1</sup>

<sup>1</sup> *Yule v. Yule*, 10 N. J. Eq. 138; *Cory v. Cory*, 11 N. J. Eq. 400; *Anshutz v. Anshutz*, 16 N. J. Eq. 162; *Doyle v. Doyle*, 26 Mo. 545; *McIntyre v. McIntyre*, 80 Mo. 470; *DeGraw v. DeGraw*, 7 Mo. Ap. 121; *Parsons v. Parsons*, 9 N. H. 309; *Bowman v. Worthington*, 24 Ark. 522; *Ross v. Ross*, 69 Ill. 569; *Trotter v. Trotter*, 77 Ill. 510; *Carroll v. Carroll*, 42 La. An. 1071; *Holbrook v. Holbrook*, 32 La. An. 13; *Moore v. Moore*, 18 La. An. 818; *Heyob v. Her Husband*, 18 La. An. 41; *Moon v. Baum*, 58 Ind. 194; *Fischli v. Fischli*, 1 Blackf. 360; *Perkins v. Perkins*, 16 Mich. 162; *Peltier v. Peltier, Harring*. (Mich.) 19; *Trevino v. Trevino*, 63 Tex. 650.

In an early case of first impression the wife applied for main-

tenance out of funds due her from her father's estate, and alleged that the husband had deserted her before her father's death and returned to her for the sole purpose of receiving her share of the estate and had since deserted her. Counsel for the wife contended that a court of equity had jurisdiction on the ground of fraud, trust and the prevention of injustice. After an exhaustive review of the English authorities the court found no exact precedent, and held that the jurisdiction exercised by the court of chancery in England in such cases is not founded on the basis of trust or fraud, but is a branch of equity connected with the power to enforce a settlement upon her out of her estate, and was origi-

These authorities do not discuss the question of the jurisdiction of a court of equity to grant relief where there is no adequate remedy at law, but seem to have overlooked this proposition. The cases cited are not, therefore, authorities denying such jurisdiction to courts of equity. The common-law alimony was undoubtedly an incident to a suit for divorce in its true and technical meaning. Where the statute has provided certain instances in which the wife is entitled to alimony without a divorce, the courts have declined to grant alimony in all cases which do not fall within the statute. The rule *expressio unius est exclusio alterius* was not applied. The courts do not base their decision on a construction of the statute, but have denied the wife's application on the ground that alimony is always an incident of divorce unless the statute provides otherwise. Thus, in New Jersey, the courts are authorized to grant alimony where the husband, without any justifiable cause, deserts the wife or refuses or neglects to maintain and provide for her, and it is held that the power to grant this kind of relief is confined to the cases mentioned in the statute.<sup>1</sup> These cases are followed in Missouri under a similar statute.<sup>2</sup> The statute of Illinois authorizes the court to grant alimony to the husband where the wife is living apart from her husband without her fault.

nally exercised only where the husband sought the aid of a court of equity to gain possession of his wife's property. It was also held that the jurisdiction conferred by statute in cases of fraud and trust did not empower the court to decree the wife, on her application, a sum for her maintenance out of her equitable property, although such property was in the hands of an administrator as a distributive share of the estate. Parsons *v.* Parsons, 9 N. H. 309 (1838).

In suits involving the effect of decrees of alimony and divorce the

courts have said by way of *dictum* that alimony is always an incident to the suit for divorce. Bowman *v.* Worthington, 24 Ark. 522; Moon *v.* Baum, 58 Ind. 194; Perkins *v.* Perkins, 16 Mich. 162; Peltier *v.* Peltier, Harring. (Mich.) 19.

<sup>1</sup> Yule *v.* Yule, 10 N. J. Eq. 138, followed in Cory *v.* Cory, 11 N. J. Eq. 400, and Anshutz *v.* Anshutz, 16 N. J. Eq. 162.

<sup>2</sup> Doyle *v.* Doyle, 26 Mo. 545, followed in McIntyre *v.* McIntyre, 80 Mo. 470, De Graw *v.* De Graw, 7 Mo. Ap. 121.

The object of the statute is said to be to remedy the defect of the common law which did not enforce the duty of the husband to support the wife until she had purchased necessities on his credit, and was intended as a remedy in all cases where she would be justified in obtaining such support on the credit of the husband at the common law. It is held that relief will not be granted in cases not within the statute because a court of equity has no jurisdiction in such cases.<sup>1</sup> The statutes of Texas and Louisiana do not permit a suit by the wife for maintenance.<sup>2</sup>

But the relief asked for is maintenance without a divorce. The real question is, Can such relief be granted the wife without divorce, when the statute has provided that she may have that relief with divorce?<sup>3</sup> The weight of the most carefully considered authorities is that such relief can be granted by a court of equity on the ground that there is no adequate remedy at law. The reasons upon which this doctrine is based will be stated at some length, as the question has not been fully discussed in any work on this subject.

In the various editions of his work, Mr. Bishop has denied the jurisdiction of courts of equity to grant this relief. The reason assigned by him was that "in England, whence we derive our laws, neither the equity tribunals nor any other had the jurisdiction when this country was settled. If we assume that equity had it during the commonwealth, it did not afterward. Our ancestors brought with them the laws of the mother country as they were at the date of the emigration, not at a previous date. They did not transfer hither what in England had then no existence. If the ecclesiastical courts had exercised this jurisdiction there would be a show of reason for saying that, as we have no such courts, equity may take it. But even this argument is done away with by

<sup>1</sup> *Ross v. Ross*, 69 Ill. 569; *Trotter v. Trotter*, 77 Ill. 510. 1071; *Holbrook v. Holbrook*, 32 La. An. 13.

<sup>2</sup> See *Trevino v. Trevino*, 63 Tex. 650; *Heyob v. Her Husband*, 18 La. An. 41; *Moore v. Moore*, 18 La. An. 618; *Carroll v. Carroll*, 42 La. An. 3 See on this point the conclusion reached in *Edgerton v. Edgerton*, 12 Mont. 122, 29 P. 967.

the uniform holding of our tribunals that, in the absence of ecclesiastical courts, equity cannot perform their divorce functions. *Moreover there is no one head of equity power to which by analogy this can be said to belong.* Again, let the reader notice the peculiarity of this proceeding. A divorce from bed and board given to the wife concludes with the same decree for alimony which this proceeding does. But it also contains a finding and a judgment, not that the marriage is dissolved, but that she who is to be alienated is entitled, by reason of the fault of the other party, to live in separation. In the proceeding under consideration, a court acknowledging itself *without power to adjudicate the right to live in separation* — for that would be simply and exactly to pronounce a divorce from bed and board — undertakes to make a permanent order for alimony. And yet, as a foundation for the order, it passes upon the very question of right which it admits not to be within its jurisdiction, and which, therefore, it does not reduce to record.”<sup>1</sup> This reasoning has not found favor with our courts where the question has since arisen. In many well-considered cases it is held that courts of equity do *have the power to adjudicate the right to live in separation*, and that such courts have jurisdiction to grant relief in such cases on the ground that there is no adequate remedy at law, and to prevent multiplicity of suits.<sup>2</sup>

The deserted wife may obtain necessary support by purchasing supplies on her husband’s credit, and these creditors may each recover from the husband. But this is not an adequate remedy, and involves the husband in numerous

<sup>1</sup> Bishop on Mar., Sep. & Div., Bland (Md.), 544; Anonymous, 1 § 1400. See same, Mar. & Div., Hayw. (N. C.) 347; Earle v. Earle, 356 (1881).

<sup>2</sup> Garland v. Garland, 50 Miss. 694; Galland v. Galland, 38 Cal. 265; Butler v. Butler, 4 Litt. (Ky.) 202; Purcell v. Purcell, 4 H. & M. (Va.) 507; Lockridge v. Lockridge, 3 Dana, 28; Graves v. Graves, 36 Ia, 310; Helms v. Franciscus, 2

Bland (Md.), 544; Anonymous, 1 Hayw. (N. C.) 347; Earle v. Earle, 27 Neb. 277, 43 N. W. 118; Bueter v. Bueter, 1 S. Dak. 94, 45 N. W. 208; Edgerton v. Edgerton, 12 Mont. 122, 29 P. 967.

In addition to these leading cases see, also, as following the above:

Alabama: Glover v. Glover, 16 Ala. 440; Hinds v. Hinds, 80 Ala.

suits. The wife is generally unable to purchase goods under the circumstances, for the creditor is reluctant to give credit where he will become involved in a suit in which he must prove the reasonable value of his goods, and also that the wife had good cause in separating from her husband. This relief is also inadequate, because the husband may escape his liability by fraudulently disposing of his property, or removing it beyond the jurisdiction of the court. The inadequacy of this common-law remedy is apparent from the number of states which have provided for a direct proceeding against the husband for support.<sup>1</sup> The wife cannot in

225; *Wray v. Wray*, 33 Ala. 187; *Crane v. Meginnis*, 1 Gill & J. 463; *Murray v. Murray*, 84 Ala. 363.

**Arkansas:** *Wood v. Wood*, 54 Ark. 172, overruling *Bowman v. Washington*, 24 Ark. 522.

**Colorado:** *Daniels v. Daniels*, 9 Colo. 183.

**District of Columbia:** *Cheever v. Wilson*, 6 Dist. Col. 149; *Shaw v. Shaw*, 22 Wash. L. Rep. 77; *Tolman v. Tolman*, 1 App. D. C. 299.

**Iowa:** *Finn v. Firin*, 62 Ia. 482; *Farber v. Farber*, 64 Ia. 362; *Platner v. Platner*, 66 Ia. 378; *Whitcomb v. Whitcomb*, 46 Ia. 437; *Simpson v. Simpson* (Ia.), 59 N. W. 22.

**Kentucky:** *Boggess v. Boggess*, 4 Dana, 307; *Woolridge v. Lucas*, 7 B. Mon. 49; *Hulett v. Hulett*, 80 Ky. 364; *Arnold v. Arnold*, 14 S. W. 376.

**Maryland:** *Fornhill v. Murray*, 1 Bland, 479; *Macnamara's Case*, 2 Bland, 566; *Scott's Case*, 2 Bland, 568; *Govane's Case*, 2 Bland, 570; *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Wiles v. Wiles*, 3 Md. 1; *Jamison v. Jamison*, 4 Md. Ch. 289; *Wright v. Wright*, 2 Md. 429; *Hewitt v. Hewitt*, 1 Bland, 101;

*Dunnock v. Dunnock*, 3 Md. Ch. 140.

**Mississippi:** *Verner v. Verner*, 62 Miss. 260; *McFarland v. McFarland*, 64 Miss. 449.

**North Carolina:** *Knight v. Knight*, 2 Hayw. 101; *Spiller v. Spiller*, 1 Hayw. 482; *Hodges v. Hodges*, 82 N. C. 122.

**Rhode Island:** *Batty v. Batty*, 1 R. I. 212.

**South Carolina:** *Jelineau v. Jelineau*, 2 Des. 45; *Briggs v. Briggs*, 24 S. C. 377; *Prather v. Prather*, 4 Des. 33; *Mattison v. Mattison*, 1 Strob. Eq. 387; *Threewits v. Threewits*, 4 Des. 560; *Prince v. Prince*, 1 Rich. Eq. 282; *Rhame v. Rhame*, 1 McCord Eq. 197.

**Virginia:** *Purcell v. Purcell*, 4 H. & M. 507; *Almond v. Almond*, 4 Rand. 662.

See, also, similar cases in foreign countries: *Severn v. Severn*, 3 Grant (U. C.) Ch. 431; *Soules v. Soules*, 2 Grant (U. C.) Ch. 299; *Wood v. Wood*, 1 Manitoba, 317; *Weir v. Weir*, 10 Grant, 565; *Howey v. Howey*, 27 Grant, 57.

<sup>1</sup> See *Ross v. Ross*, 69 Ill. 569.

this country procure a restitution of conjugal rights. And it has been decided<sup>1</sup> that the writ of *supplicavit* is not a proper remedy in such cases.<sup>1</sup> In an early case it was said: "It is clear that strong moral obligations must lie on the husband, who has abandoned his wife, to support her. The marriage contract, and every principle, binds him to this. If he fails to do it, it is a wrong acknowledged by common law, *though the law knows no remedy, because the wife cannot sue the husband*; but in equity the wife can sue the husband; and it is the province of the court of equity to afford the remedy where conscience and law acknowledge the right but know no remedy."<sup>2</sup>

We have no English precedent in which this relief was granted by the chancery court; but it seems that this court took cognizance of other cases concerning marital rights, such as controlling the wife's separate property, and devoting it to her separate maintenance where the husband had so conducted himself as to justify her living in separation, and restraining the husband by the writ *ne exeat* from quitting the kingdom to evade the payment of an allowance. In his work on Equity Jurisprudence, Judge Story says: "In America a broader jurisdiction in cases of alimony has been asserted in some of our courts of equity; and it has been held that if a husband abandons his wife, and separates himself from her without any reasonable support, a court of equity may in all cases decree her a suitable maintenance and support out of his estate, upon the very ground that there is no adequate or sufficient remedy at law in such a case. And there is so much good sense and reason in this doctrine that it might be wished it were generally adopted." It must not be overlooked that the statutory delegation of power to courts of equity varies in our states, and that in some instances the court may reach different conclusions on this question.

<sup>1</sup> Adams *v.* Adams, 100 Mass. 365. *land v. Galland*, 38 Cal. 265; Earle

<sup>2</sup> Butler *v.* Butler, 4 Litt. (Ky.) *v.* Earle, 27 Neb. 277; Bueter *v.* 202, cited with approval in Gal- Bueter, 1 S. Dak. 94, 45 N. W. 208.

Mr. Bishop objects to courts of equity granting this relief, because such courts have no power to determine that the wife is living separate from her husband for justifiable cause, and that such finding is in effect a decree for separation. But it must be remembered that the common-law courts had to determine the same facts when the creditor sued the husband for the wife's support.<sup>1</sup> A similar instance is where the validity of a marriage is in question. Such controversy does not deprive either the courts of equity or common law of jurisdiction to determine the validity of a marriage as an incident to the enforcement of some right, although no decree of annulment could be entered. It would seem that a court would have the power to decree separate maintenance although in doing so it will determine that the separation is lawful.

The jurisdiction of our modern courts of equity would seem to be beyond question in states where the distinction between law and equity is declared by statute to have been abolished, and also where jurisdiction of divorce has been conferred upon courts of equity. But in almost every state it would seem that courts of equity would have jurisdiction on the ground that there was no adequate remedy at law and to prevent multiplicity of suits. Jurisdiction was based on this ground in Iowa in a well considered case in which the main question involved was the jurisdiction of the court. On this point it was said: "That a husband is bound, both in law and in equity, for the support and maintenance of his wife is a proposition hitherto and now undisputed. If by his conduct he makes it unsafe, or by entertaining others there he makes it immoral for her to remain at his home, she may leave it and him and carry with her his credit for her maintenance elsewhere. So that in such case a victualer, a merchant, a dressmaker, a milliner, or any dealer in the necessaries of life, may severally supply the wife with articles needful and proper in her situation, and may respect-

<sup>1</sup> See reasoning in *Edgerton v. Edgerton*, 12 Mont. 122, pages 142, 143.

ively maintain their action against the husband for their value. This remedy the law affords. But this involves multiplicity of suits; and besides the remedy is by no means adequate. The wife may find it difficult, if not impossible, to obtain a continuous support in this way, since such dealers and professional men would be unwilling to supply their articles or services if thus compelled to resort to litigation in order to secure their pay. Here then is a plain legal duty of the husband, for the violation of which no adequate remedy, even with a multiplicity, can be had except in a court of equity. Upon the ground of avoiding a multiplicity of suits, or on the ground that no adequate remedy can be had at law, a court of equity may properly base its jurisdiction in such cases.”<sup>1</sup> The doctrine announced in this case seems to be correct, and has been followed in Iowa and approved elsewhere.<sup>2</sup>

**§ 1001. The question as affected by statutes.**—In many of the states where the courts have denied the power to grant separate maintenance the jurisdiction has been conferred by statute. These statutes are not uniform, but provide in substance that the court may decree separate maintenance where the husband has been guilty of desertion and failure to support. A reference to the cases where such statutes have been interpreted and enforced may be useful.<sup>3</sup>

It is the object of such statutes to give the wife a sure

<sup>1</sup> *Graves v. Graves*, 36 Ia. 310. In this case the husband deserted the wife, procured a void decree of divorce and was living in adultery with another woman, and had neglected to support his wife.

<sup>2</sup> *Earle v. Earle*, 27 Neb. 277. In *Bueter v. Bueter*, 1 S. Dak. 94, 45 N. W. 208, the above cases are reviewed, and it was said: “These cases, while possibly not in line with the prevailing current of judicial decisions, either in England or this country, commend them-

selves to our judgment. This reasoning seems to us logical and safe, and their conclusions in harmony with the present legal *status* of married women. A denial of such jurisdiction would seem to expose the law and the courts to the just criticism of having squarely asserted the wife’s right to support from her husband, yet denying her a remedy when such support is refused.”

<sup>3</sup> **California:** Civil Code, 136; *Hagle v. Hagle*, 68 Cal. 588; *Hagle*

and speedy remedy whenever the husband fails to perform his legal duty, instead of leaving her right to be wrought out through a third person, as at common law. These statutes are remedial, and should be construed to give the wife

*v. Hagle*, 74 Cal. 608; *Hardy v. Hardy*, 97 Cal. 125, 31 P. 906; *Peyre v. Peyre*, 79 Cal. 336.

**Georgia:** *Clark v. Clark*, 78 Ga. 79; *Gardner v. Gardner*, 54 Ga. 560;

*McGee v. McGee*, 10 Ga. 477; *Glass v. Wyn*, 76 Ga. 319; *Hawes v. Hawes*, 66 Ga. 142; *Lamar v. Jennings*, 69 Ga. 392.

**Illinois:** *Ross v. Ross*, 69 Ill. 569; *Wahle v. Wahle*, 71 Ill. 510; *Farrell v. Farrell*, 28 Ill. Ap. 87; *Fountain v. Fountain*, 23 Ill. Ap. 529; *O'Brock v. O'Brock*, 32 Ill. Ap. 149; *Houts v. Houts*, 17 Ill. Ap. 439; *Jenkins v. Jenkins*, 104 Ill. 134; *Cooper v. Cooper*, 4 Ill. Ap. 285; *Tureman v. Tureman*, 4 Ill. Ap. 335; *Johnson v. Johnson*, 125 Ill. 510; *Umlauf v. Umlauf*, 9 Ill. Ap. 517, 117 Ill. 580; *Hunter v. Hunter*, 7 Ill. Ap. 253; *Klemme v. Klemme*, 37 Ill. Ap. 54.

**Indiana:** *Walter v. Walter*, 117 Ind. 247; *Harris v. Harris*, 101 Ind. 499; *Carr v. Carr*, 6 Ind. 377, 33 N. E. 805; *Chapman v. Chapman*, 13 Ind. 396; *Hallett v. Hallett* (Ind.), 34 N. E. 740.

**Massachusetts:** *Smith v. Smith*, 154 Mass. 262; *Blackinton v. Blackinton*, 141 Mass. 432; *Silverman v. Silverman*, 140 Mass. 560; *Doole v. Doole*, 144 Mass. 278; *Watt v. Watt*, 160 Mass. 464, 36 N. E. 479.

**Michigan:** *Russell v. Russell*, 75 Mich. 572; *Tobey v. Tobey*, 100 Mich. 54, 58 N. W. 629; *Chaffee v. Chaffee*, 15 Mich. 184.

**Missouri:** *Dwyer v. Dwyer*, 26 Mo. Ap. 653; *Spengler v. Spengler*,

38 Mo. Ap. 266; *Lindenschmidt v. Lindenschmidt*, 29 Mo. Ap. 295; *Newton v. Newton*, 32 Mo. Ap. 162; *McGrady v. McGrady*, 48 Mo. Ap. 668.

**New Jersey:** *Anshutz v. Anshutz*, 16 N. J. Eq. 162; *Walling v. Walling*, 16 N. J. Eq. 389; *Davis v. Davis*, 19 N. J. Eq. 180; *Cory v. Cory*, 11 N. J. Eq. 400; *Begbie v. Begbie*, 7 N. J. Eq. 98; *Martin v. Martin*, 8 N. J. Eq. 563; *Starkey v. Starkey*, 21 N. J. Eq. 185; *Ballentine v. Ballentine*, 5 N. J. Eq. 471; *Boyce v. Boyce*, 23 N. J. Eq. 337, 24 N. J. Eq. 588; *McEwen v. McEwen*, 10 N. J. Eq. 286; *Shinn v. Shinn*, 51 N. J. 78, 24 A. 1022; *Elliott v. Elliott*, 48 N. J. 231; *O'Brien v. O'Brien*, 23 A. 1073; *Fairchild v. Fairchild*, 43 N. J. Eq. 473, 11 A. 426.

**New York:** *Ramsden v. Ramsden*, 91 N. Y. 281; *Douglas v. Douglas*, 5 Hun, 140; *Davis v. Davis*, 1 Hun, 444; *Ruckman v. Ruckman*, 58 How. Pr. 278; *Atwater v. Atwater*, 36 How. Pr. 431; *Pomeroy v. Wells*, 8 Paige, 406; *P. v. P.*, 24 How. Pr. 197.

**North Carolina:** *Hodges v. Hodges*, 82 N. C. 122; *Cram v. Cram* (N. C.), 21 S. E. 197.

**North Dakota:** *Bauer v. Bauer*, 2 N. Dak. 108, 49 N. W. 418.

**Ohio:** *Woods v. Waddle*, 44 O. St. 449; *Dailey v. Dailey*, Wright, 514; *Questel v. Questel*, Wright, 491; *Bascom v. Bascom*, Wright, 632.

**Pennsylvania:** *Appeal of Nye*, 126 Pa. 341, 17 A. 618.

a right of action wherever she is justified in living in separation.<sup>1</sup> The statutes contemplate a suit in equity and are constitutional, although they contain no provision for a trial by jury.<sup>2</sup>

The question has been considered as one of jurisdiction of courts of equity, and it remains to inquire whether, under the statutes, such relief is not prohibited by implication or by express provision; and whether a decree of separation will not be an adequate remedy. In all the states where courts of equity have exercised this jurisdiction the statutes have provided for alimony or a suitable maintenance after a decree of divorce.<sup>3</sup> It has been contended that where the statute provides for alimony when a divorce is granted, this impliedly negatives the power to grant such relief in other cases. But in every case where such interpretation was insisted upon, the courts have held that such provisions do not prohibit the court from granting the same relief without divorce.<sup>4</sup> The maxim *expressio unius est exclusio alterius* has no application to this class of cases.<sup>5</sup> In a well considered case it was held that the legislature, in enacting such provision, did not intend to relieve the deserting husband from liability to support his wife. "If this provision implied that the obligation could only be enforced by first dissolving the bonds of matrimony, the law would be open to the charge that it was so framed as to encourage divorces; for the wife who kept faith with the marriage vows might be driven by privation, in some cases at least, to release the husband from the bonds of matrimony, in order to obtain relief from penury and want. Such a construction of the legislative intent would make the statute provide, in effect,

**Tennessee:** Nicely *v.* Nicely, 40 <sup>2</sup>Bigelow *v.* Bigelow, 120 Mass. Tenn. 184; Richardson *v.* Wilson, 320.

.8 Yerg. 67.

<sup>3</sup> See cases affirming the right to

**Vermont:** Morse *v.* Morse, 65 Vt. decree alimony without divorce. 112; Danville *v.* Wheelock, 47 Vt. .57.

<sup>4</sup> Galland *v.* Galland, 38 Cal. 265; Earle *v.* Earle, 27 Neb. 277; Bueter

<sup>1</sup> Weigand *v.* Weigand, 41 N. J. v. Bueter, 1 S. Dak. 94, 45 N. W. 208. Eq. 202.

<sup>5</sup> Galland *v.* Galland, 38 Cal. 265.

that in case a wife was driven away or deserted, and left without means of support, she must wait (the statutory period), and in the meantime suffer in destitution, or suffer the humiliation of becoming a public charge, or seek relief through friends or strangers, before she could call upon a court to grant her a divorce, and then compel the offending husband, out of his substance, to fulfill his obligation to support her; at which time the derelict husband may have placed himself and property beyond the reach of the court; at least he would, in such case, be given ample opportunity to do so."<sup>1</sup>

Where the statute provides that in an action for divorce the court may grant alimony although a decree is refused, it is held that such provision authorizes the court to grant separate maintenance in an independent proceeding.<sup>2</sup> This construction is clearly erroneous, as it is apparent from the context that only proceedings for divorce were contemplated, and so this statute is construed in New York.<sup>3</sup> Such provision does not prevent a court of equity from granting relief in an independent proceeding, as it has no reference to such proceeding.<sup>4</sup>

The fact that the same relief may be obtained by a decree of separation and alimony has been held a sufficient reason for denying separate maintenance.<sup>5</sup> But the decree for separation changes to some extent the *status* of the parties and exceeds the relief desired. The wife may not desire a separation, but maintenance until a reconciliation can be effected. This question is not discussed in the authorities, but the relief is granted in many states where the wife could have obtained a decree of separation.

**§ 1002. When maintenance is granted.**—This suit proceeds upon the liability of the husband for the support of

<sup>1</sup> Harwood, J., in *Edgerton v. Douglas*, 281; *Douglas v. Douglas*, 5 Hun, *Edgerton*, 12 Mont. 122, 29 P. 969. 140, and cases cited.

<sup>2</sup> *Nicely v. Nicely*, 40 Tenn. 182. <sup>4</sup> *Earle v. Earle*, 27 Neb. 277.

<sup>3</sup> *Ramsden v. Ramsden*, 91 N. Y. <sup>5</sup> See *dictum* in *Adams v. Adams*, 100 Mass. 365.

his wife, and the gist of the action is the failure to support. The husband is not liable in this action if he offers to support the wife at home. But such offer may be refused by the wife if the husband is guilty of some misconduct which is a cause for divorce, in which case she may refuse such offer and recover from the husband. In this respect the suit follows the common-law liability of the husband for the goods sold to the wife. He is liable if he drives her away from the home by his misconduct, but not if she voluntarily deserts him. Cruelty which would entitle her to a decree of separation will justify her in living apart from her husband and render him liable for her support.<sup>1</sup> And it is clear that the wife is justified in separating from her husband where he is living in adultery.<sup>2</sup> To determine when the wife is not justified in leaving her husband, reference may be had to the general law of desertion, which need not be repeated here. The proceeding in equity is to determine that the wife is destitute, and is justified in living apart from her husband, and that the husband has means or ability to support her. The question of the lawful separation will not arise unless the husband pleads that he is willing to support the wife if she will return. Under some statutes, however, the court must find that the wife is justified in living apart from her husband or that he is guilty of some cause for divorce.<sup>3</sup> As a general rule the relief is granted where the wife is destitute and is deserted or is justified in living in separation.<sup>4</sup> The desertion must be with-

<sup>1</sup> *Lockridge v. Lockridge*, 3 Dana, 28; *O'Brock v. O'Brock*, 32 Ill. Ap. 149; *Hunter v. Hunter*, 7 Ill. Ap. 253; *McCahill v. McCahill*, 71 Hun, 224, 25 N. Y. Supp. 221. *Hardy v. Hardy*, 97 Cal. 125, 31 P. 906; *P. v. P.*, 24 How. Pr. 197; *Ruckman v. Ruckman*, 58 How. Pr. 278; *Douglas v. Douglas*, 5 Hun, 140; *Peyre v. Peyre*, 79 Cal. 336;

<sup>2</sup> *Graves v. Graves*, 36 Ia. 310; *Briggs v. Briggs*, 24 S. C. 377; *Prather v. Prather*, 4 Des. 33; *Weigand v. Weigand*, 41 N. J. Eq. 202, and cases cited. <sup>4</sup> As to the nature of the desertion see *Johnson v. Johnson*, 125 Ill. 510; *Seelye v. Seelye*, 45 Ill. Ap. 27; *Ross v. Ross*, 69 Ill. 569; *Angelo v. Angelo*, 81 Ill. 251; *Speng-*

<sup>3</sup> *Hagle v. Hagle*, 74 Cal. 608; *Speng-*

out legal justification, but the wife is entitled to relief before the desertion has continued the statutory period.

In many of the states this relief must be granted according to the provisions of the statute; but where the relief is granted by a court of equity, because there is no adequate remedy at law, the court may proceed upon the general principles which govern the law of divorce in determining whether the wife is in fault, and whether the husband is guilty of desertion and failure to support. A reference to a few leading cases may be useful here to illustrate the principles which govern the right to separate maintenance in the absence of statute. In a leading case the parties had resumed cohabitation after they had entered into articles of separation. The husband again withdrew from the wife, leaving her a house and lot and some unproductive property, and caused a notice to be published in the papers warning all persons to refuse credit to his wife on his account. This notice prevented her from obtaining goods and left her destitute. The husband refused all assistance and refused to live with her, and insisted that she obtain a divorce from him on account of his desertion, but the wife hoped a reconciliation and reunion would take place and refused to apply for a divorce or a decree of separation. It was held that the wife was entitled to separate maintenance, although it does not appear that the wife was entitled to a decree for desertion.<sup>1</sup>

In another case the husband drove the wife from the house and refused to cohabit with her without cause. He provided a monthly allowance for the wife and child, but such allowance

ler *v.* Spengler, 38 Mo. Ap. 266; Fountain *v.* Fountain, 23 Ill. 529; Bueter *v.* Bueter, 1 S. Dak. 94, 45 N. W. 208; Van Duzer *v.* Van Duzer, 70 Ia. 614; Meeker *v.* Meeker (N. J. Eq.), 27 A. 78; Lindenschmidt *v.* Lindenschmidt, 29 Mo. Ap. 295; Droege *v.* Droege, 52 Mo. Ap. 84. 694. The fact that the parties have entered into articles of separation is not a defense unless the husband can prove that the provision made for the wife is just and adequate. Daniels *v.* Daniels, 9 Colo. 133; Cram *v.* Cram (N. C.), 21 S. E. 197; People *v.* Meyer, 33 N. Y. Supp.

<sup>1</sup> Garland *v.* Garland, 50 Miss. 1123.

was small and not in proportion to his income, and he threatened to reduce the amount. The wife was granted relief although she was not entitled to a divorce.<sup>1</sup> In some recent cases the failure to support the wife and child was held sufficient to entitle the wife to maintenance, it not appearing that she was in fault.<sup>2</sup>

In any case relief should be denied where the wife is in fault,<sup>3</sup> or the husband has requested her to return.<sup>4</sup> She cannot recover separate maintenance from the guardian of her insane husband, as such action is, in effect, against the husband, and insanity is not one of the causes fixed by the statute for alimony without divorce.<sup>5</sup>

**§ 1003. The procedure.**—The suit to compel the husband to support the wife must conform to the practice of the court having jurisdiction.<sup>6</sup> In the absence of any statutory provision for recovering maintenance, the suit is always an application to a court of equity, as already stated.<sup>7</sup> The petition must allege the residence of one of the parties in the state, the marriage, and some cause for divorce justifying a separation or a desertion and failure to support, and the poverty of the wife and ability of the husband to support her.<sup>8</sup> The petition should state what amount will be necessary for the support of the wife and children. Where this is required by statute, the omission of such allegation renders the petition fatally defective.<sup>9</sup>

The jurisdiction of the court, so far as it is regulated by statute, requires the same domicile as in a suit for divorce. But it is a question to be determined from the whole act whether the provision requiring the plaintiff to be a resi-

<sup>1</sup> *Galland v. Galland*, 38 Cal. 265.

<sup>4</sup> *Meeker v. Meeker* (N. J.), 27 A. 78.

<sup>2</sup> *Graves v. Graves*, 36 Ia. 310; *Earle v. Earle*, 27 Neb. 277; *Bueter*

<sup>5</sup> *Hallett v. Hallett* (Ind.), 34 N. E. 740.

*v. Bueter*, 1 S. Dak. 94, 45 N. W. 208; *Bauer v. Bauer*, 2 N. Dak. 108, 49 N. W. 418; *Wood v. Wood*, 54 Ark. 172.

<sup>6</sup> *Bauer v. Bauer*, 2 N. Dak. 108, 49 N. W. 418.

<sup>3</sup> *Anderson v. Anderson*, 45 Ill. Ap. 168.

<sup>7</sup> § 1000.

<sup>8</sup> See form of petition, § 759.

<sup>9</sup> *Arnold v. Arnold* (Ind.), 39 N. E. 862.

dent of the state was intended to apply to this proceeding as well as divorce.<sup>1</sup> Where the proceeding is in equity, and in the absence of any statute, the court will decline to grant the relief where both parties are non-residents, although the husband has property in the state.<sup>2</sup> But where the husband is a resident of the state the non-resident wife may maintain the action.<sup>3</sup> The residence of the defendant must be such that an ordinary suit could be maintained according to the statute regulating the venue of civil cases and not the statute regulating suits for divorce.<sup>4</sup> The suit must be commenced in the usual manner by filing the petition and issuing summons.<sup>5</sup> A valid decree for separate maintenance may be rendered upon personal service out of the state if the statute permits such service.<sup>6</sup>

The liability of the husband being continuous is not barred by the statute of limitations.<sup>7</sup> The action abates upon the death of the husband and there can be no revivor against his legal representatives.<sup>8</sup>

<sup>1</sup>In Florida it is held that the statute does not apply to such provision. *Miller v. Miller*, 33 Fla. 453.

<sup>2</sup>*Keerl v. Keerl*, 34 Md. 21.

<sup>3</sup>*Tolman v. Tolman*, 1 App. Dist. Col. 299; *Wood v. Wood*, 54 Ark. 172.

<sup>4</sup>In *Campbell v. Campbell*, 67 Ga. 423, the court was held to have jurisdiction of citizens of New York who were temporarily residing at a hotel during a quarrel which occurred while *en route* to Florida. The husband was arrested while attempting to desert the wife and return to New York. The statutes relating to the venue of ordinary suits were held to apply to this form of action.

<sup>5</sup>*Yeomans v. Yeomans*, 77 Ga. 124, 3 S. E. 354. In North Dakota the suit for alimony without di-

vorce is a suit in equity. A petition was filed seeking this relief, and the district court issued an order to show cause, which was served upon the husband, and on his failure to do so on the return day of the order, the husband appeared specially and objected to the jurisdiction of the court for the reason that no summons had been served upon him as in other civil actions. This objection was sustained by the supreme court. *Bauer v. Bauer*, 2 N. Dak. 108, 49 N. W. 418.

<sup>6</sup>*Blackinton v. Blackinton*, 141 Mass. 432, 5 N. E. 830.

<sup>7</sup>*Carr v. Carr*, 6 Ind. Ap. 377.

<sup>8</sup>*Swan v. Harrison*, 42 Tenn. 534; *Gaines v. Gaines*, 9 B. Mon. 295; Anonymous. 2 Des. 198; *Glenn v. Glenn*, 7 T. B. Mon. 285.

In many respects this suit resembles the suit for divorce. The wife is entitled to temporary alimony to prosecute the action.<sup>1</sup> There must be a showing of the marriage, the wife's needs, and the ability of the husband, as in the suit for divorce.<sup>2</sup> And if the husband appeal from the order for temporary alimony, the court will grant and enforce an order for further alimony and attorney's fees to enable her to prosecute the appeal.<sup>3</sup> And the wife is allowed attorney's fees as in other actions.<sup>4</sup> An allowance will be made for her expenses on appeal.<sup>5</sup>

The wife is granted the same relief as though a divorce had been rendered, and in some states the court will grant her a portion of the real estate in fee.<sup>6</sup> There is no doubt that the wife is entitled in this proceeding to an injunction restraining the husband from conveying his property.<sup>7</sup> A fraudulent sale to avoid the decree will be set aside.<sup>8</sup> The husband's property may be seized and sold by attachment proceedings.<sup>9</sup> Payment may be enforced by proceedings for

<sup>1</sup> *Johnson v. Johnson*, 125 Ill. 510, affirming 20 Ill. Ap. 495; *Holleman v. Holleman*, 69 Ga. 676; *McFarland v. McFarland*, 64 Miss. 449; *Verner v. Verner*, 62 Miss. 260; *Daniels v. Daniels*, 9 Colo. 133; *Vreeland v. Vreeland*, 18 N. J. Eq. 43; *Newton v. Newton*, 32 Mo. Ap. 162; *Patterson v. Patterson*, 5 N. J. Eq. 389; *Harding v. Harding*, 40 Ill. Ap. 202, reversed in 144 Ill. 588, 32 N. E. 206; *Razor v. Razor*, 149 Ill. 621, 36 N. E. 963; *Crittenden v. Crittenden*, 37 Ill. Ap. 618. See form of application for temporary alimony, *Finn v. Finn*, 62 Ia. 482.

<sup>2</sup> *Miller v. Miller*, 33 Fla. 453; *Burghoffer v. Burghoffer*, 46 Ill. Ap. 396.

<sup>3</sup> *Ex parte Winter*, 70 Cal. 291; *Storke v. Storke*, 99 Cal. 621, 34 P. 339.

<sup>4</sup> *Bueter v. Bueter*, 1 S. Dak. 94; *Patterson v. Patterson*, 5 N. J. Eq. 389; *McEwan v. McEwan*, 10 N. J. Eq. 286; *Vreeland v. Jacobus*, 19 N. J. Eq. 233.

<sup>5</sup> *Simpson v. Simpson* (Ia.), 59 N. W. 22.

<sup>6</sup> *Nuetzell v. Nuetzell*, 13 Ill. Ap. 542; *Murray v. Murray*, 84 Ala. 363.

<sup>7</sup> *Price v. Price*, 90 Ga. 244, 15 S. E. 774; *Springfield Ins. Co. v. Peck*, 102 Ill. 265.

<sup>8</sup> *Bear v. Bear*, 145 Ill. 21, 33 N. E. 878, affirming 48 Ill. Ap. 327.

<sup>9</sup> *Downs v. Flanders*, 150 Mass. 92, 22 N. E. 585.

In some states the general provisions of the code of civil procedure may permit the wife to recover alimony without divorce, where the husband has made fraudulent conveyances of his property and

contempt.<sup>1</sup> The decree may be made a lien upon the husband's real property.<sup>2</sup>

The order for support is terminated upon the death of either party, or by a decree of absolute divorce in favor of either party.<sup>3</sup> The husband may ordinarily have the decree set aside if the wife refuse to live with him. But she may refuse to do so if he is guilty of any misconduct which is a cause for divorce.<sup>4</sup> If the parties resume cohabitation, or the offense is condoned by the wife, it is held that the decree will not be enforced.<sup>5</sup> But it would seem that in case of condonation the decree would remain on the records and be in full force until vacated upon the application of one or both parties. It is clear that such decree would be reinstated upon a showing that the condonation was procured by fraud or undue means and the husband had subsequently refused to support his wife.

fled from the state to avoid service of summons. In such case a court of equity may grant such relief in a proceeding *in rem*. In Colorado this relief is permitted by section 41 of the code, providing that service by publication can only be made in "cases of attachment, foreclosure, claim and delivery, divorce or other proceedings where specific property is to be affected, or the proceeding is such as is known as a proceeding *in rem*." Hanscom v. Hanscom (Colo.), 39 P. 885.

<sup>1</sup> Murray *v.* Murray, 84 Ala. 363, 4 So. 239. See same case in federal court, Murray *v.* Murray, 35 Fed. 496.

<sup>2</sup> Tobey *v.* Tobey, 100 Mich. 54, 58 N. W. 629; Thomas *v.* Thomas, 44 Ill. Ap. 604.

<sup>3</sup> Philadelphia *v.* Theile, 10 Phila. 489.

<sup>4</sup> Com. *v.* Sperling, 8 Pa. Co. Ct. R. 491.

<sup>5</sup> Wade *v.* Wade (Cal.), 31 P. 258, not officially reported.

## DECREES OF DIVORCE.

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### § 1020. In general.

- 1021. Decree *nisi*.
- 1022. Divorce from bed and board.
- 1023. Decree of nullity.
- 1024. Divorce from the bonds of matrimony—In general.
- 1025. After divorce tenants by the entirety become tenants in common.
- 1026. Dower.
- 1027. Marriage settlements and articles of separation.

### § 1028. The wife's interest in the policy of insurance.

- 1029. Name of wife after divorce.
- 1030. Courtesy and husband's interest in the wife's property after divorce.
- 1031. Homestead.
- 1032. Federal homestead.
- 1033. Effect of decree obtained in another state on constructive service.

**§ 1020. In general.**—An absolute decree of divorce from the bonds of matrimony does not, like a decree of nullity, restore the parties to their previous condition, but in effect affirms the marriage and dissolves it, leaving the parties in a new *status* as to their property rights. So far as the right to marry again is concerned, the decree dissolving the marriage leaves the parties as free as would a decree of nullity declaring that no marriage relation ever existed. Although the plaintiff has applied for and obtained a decree of divorce, the defendant is also free to marry again in the state where the decree was rendered unless the statute prohibits such marriage. This is true because, in the nature of the case, a husband whose wife has obtained an absolute divorce has no wife and is therefore single. But, the marriage having existed, the property rights of the parties have become complicated. The husband acquired the wife's property, and the right to courtesy, and perhaps some interest in her personal property and choses in action. The wife ac-

quired an interest in the husband's realty, the right of support, and a right to a distributive share of his estate should she survive him. The parties may have acquired property by marriage settlements or by joint effort or contributions, or entered into conveyances, agreements and partnerships. When the decree of divorce is rendered, the property rights of the parties should be adjusted at the same time. But where there has been no accounting, the following questions arise: What was the effect of the decree? What interest has each in the property after divorce? Who shall own the homestead? and who shall become the beneficiary of the life insurance? These questions are difficult, and require separate treatment.

**§ 1021. Decree nisi.**—A decree *nisi* is a conditional decree which may be made absolute after a certain time. It was intended to give the parties an opportunity for reconciliation before an absolute divorce was rendered. It is in the nature of a decree of separation, and does not dissolve the bonds of matrimony.<sup>1</sup> This form of decree is not rendered where a divorce is granted for desertion.<sup>2</sup> In Louisiana only the injured party can apply to have the decree made absolute.<sup>3</sup> But generally either party may apply to have an absolute decree rendered. The absolute decree dates from the time it is rendered, and does not relate back to the time the decree *nisi* was rendered.<sup>4</sup> This form of decree is rendered in England, and has been the source of much litigation there.<sup>5</sup> In Massachusetts it has given

<sup>1</sup> *Garnett v. Garnett*, 114 Mass. 347.

<sup>5</sup> *Noble v. Noble*, 1 P. & M. 691;

*Hulse v. Hulse*, 2 P. & M. 259; *Norman v. Villars*, 2 Ex. D. 359; *Collins v. Collins*, 9 P. D. 231; *Lang-*

<sup>2</sup> *Darrow v. Darrow*, 159 Mass. 262, 34 N. E. 270.

*worthy v. Langworthy*, 11 P. D. 85; *Wickham v. Wickham*, 6 P. D. 11; *Latham v. Latham*, 2 Swab. & T.

<sup>3</sup> *Johnston v. Johnston*, 32 La. An. 1139; *Van Hoven v. Weller*, 38 La. An. 903; *Daspit v. Ehringer*, 32 La. An. 1174.

299, overruled in *Ellis v. Ellis*, 8 P. D. 188; *Boulton v. Boulton*, 2

<sup>4</sup> *Cook v. Cook*, 144 Mass. 163. But see, *contra*, *Prole v. Soady*, 3 Ch. Ap. 220.

Swab. & T. 405; *Stoate v. Stoate*, 2 Swab. & T. 384; *Stone v. Stone*,

rise to many grave complications, and has led the parties into void marriages.<sup>1</sup> It is necessary for one of the parties to make an application for an absolute decree; but frequently, through the ignorance or wilfulness of the parties or the negligence of their attorneys, this requirement is not complied with, and the parties enter into void marriages.<sup>2</sup> The confusion and errors caused by this form of decree are sufficient grounds for repealing this statute. A much better method of guarding against hasty divorces, and allowing the parties time for reconciliation and reflection, is to render an absolute divorce and prohibit the parties from marrying others for a period of six months or more. A marriage contracted during this time is void;<sup>3</sup> but at the end of this period the decree is in full force without further order of the court, and the parties are free to marry again. This method is less liable to inflict injury upon innocent parties and leaves less to depend upon the parties and their attorneys.

**§ 1022. Divorce from bed and board.**—This was the only form of divorce granted by the ecclesiastical courts. It is not a satisfactory remedy in any case. When the Council of Trent in 1653 declared that marriages were indissoluble except by the will of the Pope, this remedy was invented as a mere expedient, and perhaps as an excuse for

<sup>1</sup> Swab. & T. 212; Lewis *v.* Lewis, 2 Swab. & T. 394; Forster *v.* Forster, 3 Swab. & T. 151; Ousey *v.* Ousey, 1 P. D. 56; S. *v.* B., 9 P. D. 80; M. *v.* B., 3 P. & M. 200; Fitzgerald *v.* Fitzgerald, 3 P. & M. 136; Bowen *v.* Bowen, 3 Swab. & T. 530; Clements *v.* Clements, 3 Swab. & T. 394; Palmer *v.* Palmer, 4 Swab. & T. 143; Dering *v.* Dering, 1 P. & M. 531; Patterson *v.* Patterson, 2 P. & M. 192.

<sup>2</sup> Sparhawk *v.* Sparhawk, 114 Mass. 355; Graves *v.* Graves, 108 Mass. 314; Fox *v.* Davis, 113 Mass.

255; Wales *v.* Wales, 119 Mass. 89; Moors *v.* Moors, 121 Mass. 232; Whiting *v.* Whiting, 114 Mass. 494; Edgerly *v.* Edgerly, 112 Mass. 53; Bigelow *v.* Bigelow, 108 Mass. 38; Peaslee *v.* Peaslee, 147 Mass. 171; Brigham *v.* Brigham, 147 Mass. 159; Pratt *v.* Pratt, 157 Mass. 503.

<sup>3</sup> Wickham *v.* Wickham, 6 P. D. 11; Cook *v.* Cook, 144 Mass. 163; Googins *v.* Googins, 152 Mass. 533; Moors *v.* Moors, 121 Mass. 232.

Wilhite *v.* Wilhite, 41 Kan. 154, 21 P. 174.

clerical interference. There is no necessity for this decree where the state does not hold the marriage relation as a divine institution. If some persons have religious scruples against a dissolution of the marriage, they will find other remedies adequate. Separate maintenance may be granted in most of our states with or without the aid of statute. One party may desert the other and remain away without the interference of our courts. The deserter may be arrested for leaving the family; but the courts of our country do not grant a restitution of conjugal rights; so the decree of separation is not necessary as a protection to an innocent party who has cause for deserting. The remedy is impolitic and directly opposed to the policy of our laws. It breaks up the home, and leaves the parties open to secret marriages or to adultery. It increases the danger of bastard offspring, and acts in restraint of successful marriage. It leaves the marriage to exist in name, imposing all its burdens upon both parties and depriving both of the benefits of the relation. This form of decree is not justified as a temporary decree allowing and encouraging the parties to bring about a reconciliation. The same result may be attained by denying an absolute divorce. In fact, if an absolute divorce is granted, it will not prevent or discourage a reconciliation, since the divorced parties are free to marry each other. Perhaps the greatest argument against the decree from bed and board is that the innocent party seldom seeks this kind of divorce. In New York, where absolute divorces are granted for adultery only, it is supposed that this kind of relief would be frequently granted, and yet the divorce statistics show that in the ten years ending in 1886 but two per cent. of all the decrees granted in the state were from bed and board.<sup>1</sup>

In most of our states this form of relief is permitted on the application of the plaintiff; but for the reasons already

<sup>1</sup> There is a probability that this form of divorce will become obsolete, as the wife can obtain a more satisfactory remedy by criminal proceedings against the husband for failure to support. The lower courts of New York have discontinued the practice of granting ali-

stated such relief is seldom asked for.<sup>1</sup> The power to grant a decree from bed and board must be conferred by a statute stating the causes for which it may be granted. If the power is not so conferred, the court will not grant a separation for the common-law causes for divorce.<sup>2</sup> There are some states in which the court may determine at its discretion whether the decree shall be for absolute divorce or a divorce from bed and board.<sup>3</sup> In the exercise of this discretion the court will consider the interest of the state as well as the desire of plaintiff. In a Michigan case the lower court granted a permanent separation; but the supreme court changed this decree to an absolute divorce. The court said: "The statute has authorized the courts, where a case is made out for a permanent separation, to decree an absolute divorce if it appears proper to do so. This is not done to meet the desire of the parties, but on grounds of public policy, to prevent the mischiefs arising from turning out into the world in enforced celibacy persons who are neither married nor unmarried. If they have scruples about remarriage, there is nothing to prevent their continuing single as long as they choose. But when the conduct of the party complained of has broken up the marriage relation, and made it impossible to continue it, the law authorizes the court to annul it."<sup>4</sup>

mony on the decree of separation, because an order for support may be obtained in the police courts, where it can be enforced by proceedings of a summary nature by numerous officers of the courts. *Ruopp v. Ruopp*, N. Y. L. J., March 24, 1894, cited and approved in *Patton v. Patton*, 13 Misc. 726.

<sup>1</sup> For reasons for this divorce see *Barrere v. Barrere*, 4 Johns. Ch. 187.

<sup>2</sup> *Hagle v. Hagle*, 74 Cal. 608, followed by *Reade v. Reade*, 22 P. 284 (California), not reported in state reports.

<sup>3</sup> See *Conant v. Conant*, 10 Cal.

249; *Rutledge v. Rutledge*, 5 Sneed, 554; *Collier v. Collier*, 1 Dev. Eq. 356; *Whittington v. Whittington*, 2 Dev. & Bat. 64; *Moss v. Moss*, 2 Ired. 55; *Irwin v. Irwin* (Ky.), 28 S. W. 664.

<sup>4</sup> *Campbell, C. J.*, in *Burlage v. Burlage*, 65 Mich. 624.

In a late case it appeared that the husband failed to support his wife although of sufficient ability to do so; that he permitted his children by a former wife to abuse her, without objection on his part; that angry altercations had occurred concerning a marriage settlement.

In some states the statute gives the plaintiff the power to elect which form of relief he or she desires.<sup>1</sup> Under the English Divorce Act the plaintiff is entitled to what is called a judicial separation for certain causes, at his or her election.<sup>2</sup> This will place it in the power of one party to prevent the other from contracting a second marriage, and is therefore impolitic. The decree from bed and board may separate the parties forever or for a limited time. Generally the decree separates the parties "until they shall be reconciled to each other."

Such decree leaves the marriage in full force, but relieves the parties from the duty of cohabitation. It does not change their *status* or any of their rights depending upon marriage.<sup>3</sup> This form of decree continues in force until the reconciliation of the parties, or they may return to cohabitation without a new marriage or any proceedings in court.<sup>4</sup> In New York the decree of separation is not annulled by subsequent cohabitation of the parties. Such decree will not be vacated unless upon the joint application of the husband and wife.<sup>5</sup> This form of decree does not render the

with which the husband had refused to comply; that the parties were more than fifty years old and had married as a business transaction and not from affection, and that all attempts at reconciliation had failed during the pendency of the suit. It was held a divorce from bed and board forever was not an abuse of discretion. Hacker v. Hacker (Wis.), 63 N. W. 278.

<sup>1</sup> Light v. Light, 1 Watts, 263; Smith v. Smith, 3 S. & R. 248; Coverdill v. Coverdill, 3 Harr. (Del.) 13; Le Doux v. Her Husband, 10 La. An. 663.

<sup>2</sup> See Mycock v. Mycock, 2 P. & M. 98.

<sup>3</sup> Carmena v. Blaney, 16 La. An. 245; Wait v. Wait, 4 N. Y. 95;

Thompson v. Thompson, 10 Phila. 131; Young v. Young, 1 Hill, Eq. 383; Jee v. Thurlow, 2 B. & C. 547; Ireland v. Ireland, 84 N. Y. 321.

<sup>4</sup> Tiffin v. Tiffin, 2 Binn. (Pa.) 202. But see Barrere v. Barrere, 4 Johns. Ch. 187; Nathans v. Nathans, 2 Phila. 393.

<sup>5</sup> Where the wife obtained a decree of separation in New York, and the parties subsequently cohabited in New Jersey and the husband deserts the wife, the courts of the latter state hold that such decree is not annulled by such cohabitation, and the wife is not entitled to a decree of divorce for desertion. Jones v. Jones (N. J. Eq.), 29 A. 502.

See form of this decree, § 764.

wife a competent witness where she was not before;<sup>1</sup> or confer upon her the capacity to convey land as if single.<sup>2</sup> Children born during the separation are presumed legitimate.<sup>3</sup>

The matrimonial relation is not destroyed by this kind of divorce; and, as a general rule, the property rights of the parties remain unchanged. The wife is still entitled to dower on the death of the husband.<sup>4</sup> And the decree does not terminate the husband's right of curtesy.<sup>5</sup> But in some states the statutes give a greater effect to the decree, and authorize the court to make a complete distribution of the property as if the marriage never existed; or give the injured wife immediate possession of her real property.<sup>6</sup> The husband's right to reduce to his possession choses in action is not affected by this decree.<sup>7</sup> The wife's capacity to sue and be sued is not changed by this form of decree, unless the statute provide otherwise.<sup>8</sup> The right of administration is not affected.<sup>9</sup> But the court may refuse to appoint the

<sup>1</sup> *Kemp v. Downham*, 5 Harr. (Del.) 417. kenbrachs, 96 N. Y. 456; *Meehan v. Meehan*, 2 Barb. 377; *Holmes v. Holmes*, 4 Barb. 295; *Van Duzer v. Van Duzer*, 6 Paige, 366; *Renwick v. Renwick*, 10 Paige, 420; *Haviland v. Bloom*, 6 Johns. Ch. 178.

<sup>2</sup> *Ellison v. Mobile*, 53 Ala. 558.

<sup>3</sup> *Van Aerman v. Van Aerman*, 1 Barb. Ch. 375.

<sup>4</sup> *Castlebury v. Maynard*, 95 N. C. 281; *Taylor v. Taylor*, 93 N. C. 418; *Rogers v. Vines*, 6 Ired. 293; *Hokamp v. Hagaman*, 36 Md. 511; *Jarnigan v. Jarnigan*, 80 Tenn. 292. See *contra*, *Gee v. Thompson*, 11 La. An. 657.

<sup>5</sup> *Clark v. Clark*, 6 Watts & S. 85; *Rochon v. Lecatt*, 2 Stew. 429; *Smoot v. Lecatt*, 1 Stew. 590; *Ellison v. Mobile*, 53 Ala. 558.

<sup>6</sup> See statutes in *Delafield v. Brady*, 108 N. Y. 524; *Davis v. Davis*, 75 N. Y. 221; *Griffin v. Griffin*, 47 N. Y. 134; *Kamp v. Kamp*, 59 N. Y. 212; *Erkenbrachs v. Er-*

<sup>7</sup> *Stephens v. Totty*, 1 Cro. Eliz. 908; *Ames v. Chew*, 5 Met. 320; *Dean v. Richmond*, 5 Pick. 461; *Holmes v. Holmes*, 4 Barb. 295; *Fry v. Fry*, 7 Paige, 461.

<sup>8</sup> *Barber v. Barber*, 21 How. (U. S.) 582; *Barber v. Barber*, 1 Chand. 280.

<sup>9</sup> *Clark v. Clark*, 6 Watts & S. 85.

wife, where the decree was obtained on account of her adultery.<sup>1</sup>

**§ 1023. Decree of nullity.**—A decree of nullity is an adjudication that a valid marriage never existed. The parties stand as if they had always remained single. Their property rights are not affected by the invalid marriage. Rights depending on marriage, such as dower and curtesy, never existed under the void marriage, and such rights are quieted by the decree of nullity.<sup>2</sup> The court may restore any property acquired by reason of the void marriage,<sup>3</sup> but will not grant permanent alimony.<sup>4</sup> Property rights and choses in action are not affected.<sup>5</sup> The woman is relieved of her incapacity to sue and be sued. She may be sue the man who has entrapped her into a void marriage, and compel him to account for rents and profits of property he took under such marriage.<sup>6</sup> Where a woman is induced by fraud and deceit to enter into a void marriage, she may recover damages for such tort without first having the marriage annulled. Such action may be maintained against the man's administrators.<sup>7</sup> It seems that an action for services rendered during a void marriage will not lie, for there is no implied contract to pay for such services during such marriage. In a recent case the wife discovered, after the death of her husband, that he had another wife living and not divorced. She sued his administrators for services rendered as house-keeper while living with the intestate. The court said: "The legal relations of the parties did not forbid an express

<sup>1</sup> Goods of Ihler, 3 P. & M. 50.

<sup>2</sup> Price *v.* Price, 124 N. Y. 599, 27 N. E. 393; Drummond *v.* Irish, 52 Ia. 41; Zule *v.* Zule, Saxton, 96.

<sup>3</sup> A. *v.* M., 10 P. D. 178; Wheeler *v.* Wheeler, 76 Wis. 631.

<sup>4</sup> Fuller *v.* Fuller, 33 Kan. 582.

<sup>5</sup> Reading *v.* Ludlow, 43 Vt. 628; Kelly *v.* Scott, 5 Gratt. 479. Where a woman has contributed personal services and money to a business

conducted by both, she is entitled to one-half the net profits and all money advanced with interest thereon. Wheeler *v.* Wheeler, 79 Wis. 303, 48 N. W. 260.

<sup>6</sup> Young *v.* Naylor, 1 Hill Eq. 383; McDonald *v.* Fleming, 12 B. Mon. 285.

<sup>7</sup> Higgins *v.* Breen, 9 Mo. 493; Blossom *v.* Barrett, 37 N. Y. 434.

contract between them, but their actual relations and the circumstances under which the work was performed negatived any implication of an agreement or promise that it should be paid for.<sup>1</sup> . . . There was clearly no obligation to pay wages arising from contract; and the plaintiff's case is rested on the ground that there was an obligation or duty imposed by law from which the law raises a promise to pay money upon which the action can be sustained. The plaintiff's remedy was by an action of tort for the deceit in inducing her to marry him by false representations or by false promise.<sup>2</sup> The injury which was sustained by her was in being led by the promise or the deceit to give the fellowship and assistance of a wife to one who was not her husband, and to assume and act in a relation and condition that proved to be false and ignominious. The duty which the intestate owed to her was to make recompense for the wrong which he had done her."<sup>3</sup> This reasoning is wrong, as it assumes that the plaintiff, having a right to sue in tort, cannot waive the tort and sue for the services rendered while plaintiff was ignorant of the real facts. A party who accepts services from another is not required to pay for the same on an implied contract if the circumstances show that such services were intended to be gratuitous when rendered. But in this case the services were procured by fraud, and the case stood as if the intestate had procured money by fraud and his estate was liable for the same. In a similar case the wife was allowed to recover from the husband's administrator, and it was held that if the injury was a tort which resulted in no benefit to intestate, the action could not survive; but that as the injury resulted in an advantage to him the law implied a promise to pay for her services.<sup>4</sup>

<sup>1</sup> Citing *Robbins v. Potter*, 98 Mass. 532.

<sup>2</sup> Citing *Blossom v. Barrett*, 37 N. Y. 434.

<sup>3</sup> *Cooper v. Cooper*, 147 Mass. 370. See *contra*, *Fox v. Dawson*, 8 Martin, 94.

<sup>4</sup> *Higgins v. McNally*, 9 Mo. 493.

Where a decree annulling a marriage is rendered, it is error to refuse to permanently enjoin a judgment for alimony obtained in another proceeding. *Scurlock v. Scurlock*, 92 Tenn. 629, 22 S. W. 858.

**§ 1024. Divorce from the bonds of matrimony—In general.**—Every decree of divorce is to some extent an adjudication that the marriage was valid and existing at the date of the decree; for if no marriage is shown the suit for divorce must fail. A decree dissolving the marriage affirms the existence of the marriage but dissolves it. The parties are not restored to the position occupied before marriage, but are placed in a new *status* as to their property rights. Both parties are free to marry again, unless the statute authorizes the court to prohibit the marriage of the guilty party.<sup>1</sup> The obligations of marriage being mutual, the abrogation of them as to one party emancipates the other.<sup>2</sup>

The general rule as to property rights of the parties which depend upon the marriage relation is that *all non-vested property rights terminate upon the dissolution of the marriage*. Thus the wife's choses in action may be reduced to the possession of the husband during coverture, but after divorce this right of the husband ceases.<sup>3</sup> If after divorce he obtains money due her, she may recover it from him.<sup>4</sup> After divorce the husband may recover damages for the seduction of his wife before divorce.<sup>5</sup> The husband and wife may sue each other after the marriage is dissolved. The wife cannot recover damages from the husband for torts inflicted during the marriage; for the divorce cannot make that a cause of action which was not a cause of action during marriage.<sup>6</sup>

After the marriage is dissolved the wife can recover from her former husband for personal services performed before marriage. While the marriage relation subsisted she could not maintain the action; but when the relation ceased her disability was removed.<sup>7</sup> The wife after divorce has no right to any part of the personal property of the husband. The

<sup>1</sup> Barber *v.* Barber, 16 Cal. 378; Baughman *v.* Baughman, 32 Kan. 538.

<sup>4</sup> Ezell *v.* Dodson, 60 Tex. 334;

Legg *v.* Legg, 8 Mass. 99.

<sup>5</sup> Dickerman *v.* Graves, 6 Cush. 308.

<sup>2</sup> As to privileged communications after divorce, see § 782.

<sup>6</sup> Nickerson *v.* Nickerson, 65 Tex.

<sup>3</sup> Browning *v.* Headly, 2 Rob. (Va.) 340.

<sup>7</sup> Carlton *v.* Carlton, 72 Me. 115,

statute providing that she shall not lose dower on divorce does not create any right to personal property, as the term dower in such statute refers to real property.<sup>1</sup> The right to administration is also destroyed by divorce.<sup>2</sup> The wife is not entitled to a distributive share of the personal estate, although she was the innocent party and obtained a divorce for her husband's fault.<sup>3</sup> In general the divorced wife is not after the death of the husband entitled to the rights of a widow.<sup>4</sup>

**§ 1025. After divorce tenants by the entirety become tenants in common.**—Where land is conveyed to both husband and wife they become tenants by the entirety, as the common law regarded them as one person. The two took the whole estate, and each was seized of the whole and not an undivided portion of it. If death separated them the survivor still held the whole, because the survivor always had been seized of the whole, and the other had no estate which was devisable. Neither can sell the estate, and neither can sue for partition or for damages to the estate. The estate depends upon the theory of the legal unity of husband and wife. If this unity is dissolved the estate does not revert, but must remain in the parties. It cannot continue to be by entireties, since the divorced wife will not inherit from the husband. After divorce the legal unity of the parties is dissolved, they become two persons, and hold the estate as tenants in common.<sup>5</sup> This doctrine is well illustrated by a recent case in New York. Property was conveyed by deed to the husband and wife without defining the tenancy of

citing Webster *v.* Webster, 58 Me. 139; Blake *v.* Blake, 64 Me. 177. See, also, Crowther *v.* Crowther, 55 Me. 358; Pittman *v.* Pittman, 4 Or. 298; Smiley *v.* Smiley, 18 O. St. 543; Abbott *v.* Winchester, 105 Mass. 115.

<sup>1</sup> Kent *v.* McCann, 52 Ill. Ap. 305. Ind. 2.

<sup>2</sup> *In re Ensign*, 103 N. Y. 284, approving 37 Hun, 152; Bell *v.* Smal-

ley, 18 Stew. 478. But not by conduct which would be a cause for divorce. Altemus' Case, 1 Ashm. 49; Lodge *v.* Hamilton, 2 S. & R. 491; Coover's Appeal, 52 Pa. 427.

<sup>3</sup> *In re Ensign*, 37 Hun, 152.

<sup>4</sup> Chenowith *v.* Chenowith, 14

<sup>5</sup> Donegan *v.* Donegan (Ala.), 15 So. 823.

each. The husband procured a divorce on account of the adultery of the wife, married again, and died intestate. The first wife claimed that this conveyance created an estate by the entirety, and that upon the death of the husband she was entitled to the whole of the estate as survivor. The second wife claimed dower in the entire estate. It was held that the first wife was entitled to one-half of the estate as tenant in common, and the second wife was entitled to dower in one-half of the estate. Counsel for the first wife claimed that it was only necessary that the parties should stand in the relation of husband and wife at the time of the conveyance, and at that time the estate vested, and no subsequent divorce can affect an estate which is already vested. But the court inquired, "What is the character of the estate which became vested by the conveyance? If it were of such kind that nothing but the termination of the marriage by the death of one of the parties could affect it, then of course the claim of counsel is made out; but it is an assumption of the whole case to say that the estate was of the character he claims. When the idea upon which the creation of an estate by entirety depends is considered, it seems to me much the more logical, as well as plausible view, to say that as the estate is founded upon the unity of husband and wife, and it never would exist in the first place but for such unity, anything that terminates the legal fiction of the unity of two separate persons ought to have an effect upon the estate whose creation depended upon such unity. It would seem as if the continued existence of the estate would naturally depend upon the continued legal unity of the two persons to whom the conveyance was actually made. The survivor takes the whole in case of death, because that event has terminated the marriage, and the consequent unity of the parties. An absolute divorce terminates the marriage and unity of person just as completely as does death itself, only instead of one, as in the case of death, there are in the case of divorce two survivors of the marriage, and there are from the time of such divorce two living persons in whom the title

still remains. It seems to me the logical and natural outcome from such a state of facts is that the tenancy by the entirety is severed, and, a severance having taken place, each takes his or her proportionate share of the property as a tenant in common without survivorship.<sup>1</sup> Where third persons have purchased the husband's interest in an estate in entirety, a decree of divorce will entitle the wife to the right of a tenant in common without the right of survivorship.<sup>2</sup> In Michigan it is denied that divorce has any effect upon an estate by entirety.<sup>3</sup> The opinion does not discuss the effect of divorce upon this estate, but cites *Babcock v. Smith*,<sup>4</sup> as holding that the relative rights of the husband and wife in lands conveyed to a trustee in trust for them both are not affected by divorce. In Indiana it is held that where land is conveyed to a husband and wife "as joint tenants, survivor taking the whole," the whole estate vests in the survivor, although the parties were divorced.<sup>5</sup>

**§ 1026. Dower.**—In some states the statute has simply affirmed the rule that divorce bars dower.<sup>6</sup> In other states it is provided that dower is not lost by a decree of divorce on account of the misconduct of the husband.<sup>7</sup> An exami-

<sup>1</sup> *Stelz v. Shreck*, 128 N. Y. 263, 28 N. E. 510, affirming 10 N. Y. Supp. 790, 14 N. Y. Supp. 106. Consult, also, *Baggs v. Baggs*, 55 Ga. 590; *Baker v. Stewart*, 40 Kan. 442; *Jackson v. Shelton*, 89 Tenn. 82, 16 S. W. 142; *Thornley v. Thornley*, 2 Ch. 229 (1893); *Biggi v. Biggi*, 98 Cal. 35, 32 P. 803.

<sup>2</sup> *Hopson v. Fowlkes*, 92 Tenn. 697, 23 S. W. 55; *Harrer v. Wallner*, 80 Ill. 197. See *contra*, *Ames v. Norman*, 4 *Sneed*, 682.

<sup>3</sup> *Lewis' Appeal*, 85 Mich. 340, 48 N. W. 580, overruling *Dowling v. Salliotte*, 83 Mich. 131.

<sup>4</sup> 22 *Pick.* 61.

<sup>5</sup> *Lash v. Lash*, 58 Ind. 526. Where the estate is vested in both

parties during their "joint lives," a divorce is, in contemplation of law, the same as death, and such estate is terminated by an absolute divorce. *Highley v. Allen*, 3 Mo. Ap. 521.

<sup>6</sup> *McKean v. Brown*, 83 Ky. 208; *Van Cleaf v. Burns*, 118 N. Y. 549, 23 N. E. 881; *Hawkins v. Ragsdale*, 80 Ky. 353; *Hinsom v. Bush*, 84 Ala. 368, 4 So. 410, overruling *Williams v. Hale*, 71 Ala. 83.

<sup>7</sup> *Gould v. Crow*, 57 Mo. 200; *Hunt v. Thompson*, 61 Mo. 148; *Merril v. Shuttuck*, 55 Mo. 370; *Stilphen v. Houdlette*, 60 Me. 447; *Moulton v. Moulton*, 76 Me. 85; *Lewis v. Meserve*, 61 Me. 374; *Williams v. Williams*, 78 Me. 82; *Mc-*

nation of these cases will not be necessary here. But should a question arise as to the interpretation of a similar statute, some assistance may be derived from the authorities cited. This form of statute giving the wife the right of dower on divorce is not retrospective, and only applies to decrees rendered after the passage of the act.<sup>1</sup>

The word "dower" denotes the interest which the law gives the widow in the real estate of her deceased husband. It is an inchoate interest which attaches to the real estate of the husband at marriage, and to land acquired subsequently, and becomes vested in the wife upon the death of the husband. If before death the marriage is dissolved by divorce, the right to dower does not accrue, because at the death of the husband he had no wife, and consequently no widow. Before his death he was under no legal obligation to support her, and his lands should not bear any such burden after his death. It is essential to dower that the marriage relation subsist at the death of the husband. The right to dower after a dissolution of the marriage does not exist at the common law. Marriages were not dissolved at common law for causes arising after the relation was entered into; so that this question can arise only under our statutes. The courts cannot therefore create a new right, because the divorce has left the wife in circumstances unknown to the common law. The legislature, in creating a new *status*—that of a wife divorced for causes arising subsequent to the marriage,—should have conferred a corresponding right. The authorities concur that a decree of divorce dissolving the marriage is a bar to dower, whether the wife is innocent or guilty, whether the decree was obtained by her, or

Gill *v.* Deming, 44 O. St. 645; Lampkin *v.* Knapp, 20 O. St. 454; Clark *v.* Lott, 11 Ill. 105; Gordon *v.* Dickson, 131 Ill. 141; Adams *v.* Storey, 135 Ill. 448; Crane *v.* Fipps, 29 Kan. 585; Chapman *v.* Chapman, 48 Kan. 636, 29 P. 1071; Moran *v.* Somes, 154 Mass. 200; Snow *v.* Stevens, 15 Mass. 278; Davol *v.* Howland, 14 Mass. 219; Hood *v.* Hood, 110 Mass. 463.

<sup>1</sup> Curtis *v.* Hobart, 41 Me. 231. For effect of divorce obtained in another state upon dower, see § 1033.

against her, unless the statute provide otherwise.<sup>1</sup> And it is not disputed that the wife has no interest in the lands of her husband acquired after divorce.<sup>2</sup>

In New York it was early decided that a divorce dissolving the marriage on the ground of the adultery of the husband does not deprive the wife of the right of dower in his estate; but this decision was influenced to some extent by the statutes of that state.<sup>3</sup> The supreme court decided that the right to dower was lost by a dissolution of the marriage, but this decision was reversed in the court of appeals. In discussing the legal effect of a dissolution of the marriage it was said: "A divorce at common law avoided the marriage *ab initio*. It was equivalent to a sentence of nullity under our statute. It placed the parties in the same relation to each other as though there had been no marriage. The issue of the marriage was bastardized. It was in reference to the law as it then stood that Lord Coke said that to entitle the wife to dower it was necessary that the marriage should continue, for if that be dissolved the dower would cease. This rule, he is careful to say, is only applicable where there is a divorce *a vinculo matrimonii*; in other words, when the marriage is declared void *ab initio*. For adultery the divorce or separation at common law was only *a mensa et thoro*. Of course it did not affect the right of

<sup>1</sup>Barrett *v.* Failing, 6 Saw. 473; *v.* Hercklebrath, 23 Ind. 71; Miltiss. c., 111 U. S. 523; Levins *v.* Sleator, 2 Greene (Ia.), 604; Cunningham *v.* Cunningham, 2 Ind. 233; Burdick *v.* Briggs, 11 Wis. 126; Rice *v.* Lumley, 10 O. St. 596; Lampkin *v.* Knapp, 20 O. St. 454; Whitsell *v.* Mills, 6 Ind. 229; Lash *v.* Lash, 58 Ind. 526; Frampton *v.* Stephens, 21 Ch. D. 164; Marvin *v.* Marvin, 59 Ia. 699; Winch *v.* Bolton (Ia.), 63 N. W. 330; Charraud *v.* Charraud, 1 N. Y. Leg. Obs. 134; Clark *v.* Clark, 6 W. & S. 85; Dobson *v.* Butler, 17 Mo. 87; Billarn Miltimore *v.* Miltimore, 40 Pa. 151; Calame *v.* Calame, 24 N. J. Eq. 440; McCraney *v.* McCraney, 5 Ia. 232; Gleason *v.* Emerson, 51 N. H. 405; Jordan *v.* Clark, 81 Ill. 465; Pullen *v.* Pullen (N. J. Eq.), 28 A. 719.

<sup>2</sup>Fitzpatrick *v.* Dubois, 2 Sawyer, 434; Kade *v.* Lauder, 48 How. Pr. 382; Maynard *v.* Hill, 125 U. S. 190, 2 Wash. Ter. 321; Marshall *v.* Baynes, 88 Va. 1040, 14 S. E. 978; Schust *v.* Moll, 10 N. Y. Supp. 703.

<sup>3</sup>See comment of Justice Gray in Barrett *v.* Failing, 111 U. S. 523.

dower. Until our statute there was no such a thing as a divorce which recognized and admitted the validity of the marriage, and avoided it for causes which happened afterwards. Such a divorce is alone the creature of the statute. The principles applicable to a common-law divorce cannot be made applicable to a divorce which admits the validity of the marriage, and the rights and obligations resulting from it. The effect of such a divorce must be determined entirely by the provisions of the law under whose authority it is granted. The common-law divorce avoided the marriage, and all rights and obligations resulting from it. The statutory divorce is limited in its operation, and only affects the rights and obligations of the parties to the extent declared by statute. The marriage being valid, the rights it conferred, and the obligations it imposed, continue where the legislature has failed to interfere.”<sup>1</sup> The court then refers to various provisions of the statute which tended to show the intent to preserve the right of dower where the wife was the aggrieved party. This doctrine is approved in a subsequent case<sup>2</sup> in New York, but not other states.<sup>3</sup> The answer to the argument of the court is that dower at common law depended upon the concurrence of three things: the marriage, seisin of the husband, and death of the husband. The marriage, when dissolved by the statutory divorce, does not continue until the death of the husband; so that he has no widow, and therefore his estate is free from dower. That the statutory divorce has placed the wife in circumstances unknown at common law does not authorize the court to create a right which did not exist at common law, and is not conferred by statute.<sup>4</sup>

<sup>1</sup> *Wait v. Wait*, 4 N. Y. 95, reversing 4 Barb. 192.

<sup>2</sup> *Forrest v. Forrest*, 6 Duer, 102.

<sup>3</sup> The interpretation in *Wait v. Wait*, 4 N. Y. 95, is questioned in *Moore v. Hegeman*, 27 Hun, 70, affirmed 92 N. Y. 521; *Price v. Price*, 124 N. Y. 599.

<sup>4</sup> Where the right of dower is not terminated after divorce, the wife can execute a valid release to her husband as if the parties were strangers. *Savage v. Crill*, 19 Hun, 4.

The precise question decided in *Wait v. Wait* arose in Arkansas under the same statute, which provides that, "in case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." The court disapproved the New York interpretation, and held that the right of dower was terminated on divorce unless the statute expressly preserved the right and repealed the common law. It was said: "The common law in this respect is un-repealed. Here no *quasi-marital* relation or condition exists, after a divorce from the bonds of matrimony has been granted, upon which the right of dower can attach. Under the statutes of this state the widow only is entitled to dower. It is true that the language of the statute . . . indicates the opinion that the wife would be entitled to dower if the divorce should be granted on account of the misconduct of the husband; but, as said by Chief Justice Marshall,<sup>1</sup> 'a mistaken opinion of the legislature concerning the law does not make law.'"<sup>2</sup>

If the statute preserves the right of dower after divorce, it will be difficult to determine when the right to dower accrues. The right to dower, in the ordinary meaning of that term, accrues upon the death of the husband, as none but widows can claim dower. If the statute merely preserves the dower, such right remains inchoate until the husband's death, when the right would accrue. Then, if the husband has married again, both wives are entitled to dower in the same estate. The terms of the statute will generally permit a different construction, so that the divorced wife is permitted to recover dower when the divorce is granted. Under the statute of Massachusetts providing that, "When the divorce shall be for the cause of adultery committed by the husband, the wife shall have her dower assigned her in the same manner as if such husband was naturally dead," it is held that the right to dower accrued when the decree was rendered.<sup>3</sup>

<sup>1</sup> In *Postmaster-General v. Early*, 12 Wheat. 148. <sup>3</sup> *Davol v. Howland*, 14 Mass. 219; *Harding v. Alden*, 9 Me. 140; *Smith v. Smith*, 13 Mass. 231. See Run-

<sup>2</sup> *Wood v. Wood*, 59 Ark. 441.

The statute of Michigan provides that "When a divorce shall be decreed for the cause of adultery committed by the husband, or on account of his being sentenced to confinement at hard labor, the wife shall be entitled to her dower in his lands in the same manner as if he were dead." After obtaining a divorce a wife brought an action under this statute to recover dower, and it was held that the right of dower and the time when it shall become a vested interest may be regulated by legislature, and that the term, "*as if he were dead,*" indicated that the cause of action accrued when the decree of divorce became final.<sup>1</sup> She is therefore entitled to dower in the husband's lands prior to the lien of a mortgage, although such mortgage was executed by the husband during the divorce proceedings to obtain money to pay the wife alimony.<sup>2</sup> In case the husband's lands are foreclosed, the divorced wife is entitled to dower in the surplus arising from the sale.<sup>3</sup> But it is held that the wife is not entitled to an assignment of dower in the divorce proceedings.<sup>4</sup> A decree for alimony will bar the right to dower under this form of statute.<sup>5</sup>

**§ 1027. Marriage settlements and articles of separation.**—The rights under articles of separation or marriage settlements not depending upon coverture are not affected by a dissolution of the marriage. The decree of divorce does not *per se* destroy such rights.<sup>6</sup> In fixing the amount of alimony the court may consider the amount settled upon the wife as a fair allowance, and allow the agreement to re-

nels *v.* Webber, 59 Me. 488; Arnold *v.* Donaldson, 46 O. St. 73.

<sup>1</sup> Percival *v.* Percival, 36 Mich. 297; Orth *v.* Orth, 69 Mich. 158, 37 N. W. 67; Rea *v.* Rea, 63 Mich. 257.

<sup>2</sup> Orth *v.* Orth, 69 Mich. 158.

<sup>3</sup> Bowles *v.* Hoard, 71 Mich. 150.

<sup>4</sup> Holmes *v.* Holmes, 54 Minn. 352, 56 N. W. 46.

<sup>5</sup> Tatro *v.* Tatro, 18 Neb. 395, 25 N. W. 571.

<sup>6</sup> Clark *v.* Fosdick, 13 Daly, 500; Carpenter *v.* Osborn, 102 N. Y. 552; Galusha *v.* Galusha, 116 N. Y. 635; Fox *v.* Davis, 113 Mass. 255; Wright *v.* Miller, 1 Sandf. Ch. 108; Anderson *v.* Anderson, 1 Edw. Ch. 380; Buffalo *v.* Whitedeer, 15 Pa. 182; Dalton *v.* Bernardston, 9 Mass. 201; Stultz *v.* Stultz, 107 Ind. 400; Hinds *v.* Hinds, 7 Mackey, 85; Fitzgerald *v.* Chapman, 1 Ch. D. 563.

main in force.<sup>1</sup> Or if the amount is not satisfactory the court may grant additional alimony. The court cannot do so, however, in the absence of proof that the sum agreed upon was insufficient.<sup>2</sup> Where property is conveyed to a trustee to be held for the benefit of the wife during her life, with a life interest in the husband, and to her heirs on decease of both, it was held that after her death he was entitled to the use of the property, although the marriage was dissolved.<sup>3</sup> Instalments payable to the wife during her life are due to her after the marriage is dissolved.<sup>4</sup> Usually the term "wife" is descriptive of the character in which she takes a bequest or receives the benefit of an insurance policy.<sup>5</sup> And where a third person provides an annuity by will for the husband and his wife, she would not be entitled to the annuity after divorce. Sometimes the terms of the settlement are such that a divorce will terminate all rights under it. A settlement "during the continuance of said marriage" is terminated by either death or divorce.<sup>6</sup>

**§ 1028. The wife's interest in the policy of insurance.—** The wife's interest in a policy of insurance is a chose in action where she is named as the sole beneficiary. It is an interest which is vested in her when the policy is delivered.<sup>7</sup> The divorce does not, therefore, affect her interest in the policy.<sup>8</sup> It has been contended that after the divorce the wife has no insurable interest in the life of the husband.

<sup>1</sup> *Pauly v. Pauly*, 69 Wis. 419, 34 N. W. 512. <sup>2</sup> *Hipwell*, 1892 Probate, 147. And see, also, Division of property, § 965.

<sup>2</sup> *Galusha v. Galusha*, 116 N. Y. 635, affirming 43 Hun, 181.

<sup>7</sup> *Olmstead v. Keys*, 85 N. Y. 593.

But see, *contra*, *Goldsmith v. Union Mutual Life Ins. Co.*, 15 Abb. N. Cas. 409, 18 Abb. N. Cas. 325, where policies payable to the wife were reformed and made payable to another after divorce.

<sup>3</sup> *Babcock v. Smith*, 22 Pick. 61.

<sup>4</sup> *McGrath v. Insurance Co.*, 8 Phila. 113.

<sup>5</sup> See *contra*, *Bullock v. Zilley, Saxton*, 489.

<sup>8</sup> *McKee v. Phoenix Ins. Co.*, 28 Mo. 383; *Phoenix Ins. Co. v. Dunham*, 46 Conn. 79; *Aetna Life Ins. Co. v. Mason*, 14 R. I. 583.

<sup>6</sup> *Harvard College v. Head*, 111 Mass. 209. For power under divorce act to vary marriage settlement see *Storer v. Storer*, 6 Rep. (1894), 653, and cases cited; *Hipwell*

But it is held that, if the policy was valid in its inception, the cessation of the insurable interest by divorce does not make the contract void as a wager policy.<sup>1</sup> Insurance in mutual benefit societies formed for the purpose of assisting widows and children of deceased members does not vest in the wife and is not a chose in action.<sup>2</sup> Her interest in such insurance is like the right to dower, conditioned on her becoming the widow of the husband. During the life of the husband the wife's interest in this insurance is non-vested and inchoate. If, before the death of the husband, the marriage is dissolved by divorce, the wife loses all claim to the insurance, for she cannot become the widow of the insured. The beneficiary association must comply with the statute under which it was organized; and if it requires the money to be paid to the widow of deceased, or to families of deceased members or their heirs, the divorced wife is not entitled to any part of the fund.<sup>3</sup>

**§ 1029. Name of wife after divorce.**—After marriage custom confers the husband's surname upon the wife. This name she may retain through life, although the marriage is subsequently dissolved by death or divorce. If the marriage is annulled and declared void from the beginning, the supposed or reputed wife will have no right to the surname after such decree. A dissolution of the marriage does not affect the right of the wife to resume her maiden name, as at common law a person may assume any name which will not interfere with the rights of others.

In an action for damages for breach of marriage promise a divorced woman was permitted to sue in her maiden name. "The plaintiff," it was said, "had procured a divorce from a bad husband and judiciously dropped his bad name and resumed that given by her parents. It was in effect the resumption of her original name by operation of law, rather

<sup>1</sup>Conn. Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457. <sup>2</sup>Tyler v. Odd Fellows, 145 Mass. 134; Am. Legion of Honor v. Smith,

<sup>2</sup>Johnson v. Van Epps, 14 Ill. 45 N. J. Eq. 466. Ap. 201.

than choice or fancy. . . . Its dissolution restored her former rights, one of which was the liberty of bearing her family name, and this privilege she has seen fit to exercise.”<sup>1</sup> It is clear that a divorced woman may at common law assume her maiden name.<sup>2</sup> It is also held that she may assume a different name without divorce.<sup>3</sup> The power to change the wife’s name when the decree is rendered is sometimes regulated by statute.<sup>4</sup>

**§ 1030. Courtesy and husband’s interest in the wife’s property after divorce.**—An estate by courtesy is the interest to which the husband is entitled upon the death of the wife, in the lands or tenements of which she was seized in possession, in fee-simple, or in tail, during their coverture, provided they had lawful issue born alive which might by possibility inherit the estate as heir to the wife. It is said that when a man marries a woman seized of an inheritance, and has by her issue born alive, capable of inheriting the estate, on her death he holds the lands for life, “as tenant by the courtesy of England.” The requisites to this estate are a legal marriage, an actual seisin or possession in the wife, issue born of the marriage, and the death of the wife. During the life of the wife the estate is initiate and non-vested. If, before her death, the marriage is dissolved, the estate ceases, under the rule that all non-vested interests of the married parties cease upon the dissolution of the marriage.<sup>5</sup>

<sup>1</sup> Rich *v.* Mayer, 7 N. Y. Supp. 69. 225; Barber *v.* Root, 10 Mass. 260;

<sup>2</sup> Fendall *v.* Goldsmid, 2 P. D. 263. Renwick *v.* Renwick, 10 Paige, 420;

<sup>3</sup> Clark *v.* Clark, 19 Kan. 522, citing *In re Smook*, 2 Hilt. (N. Y.) 566; Cooper *v.* Burr, 45 Barb. 9; Goodenow *v.* Tappan, 1 O. 61. At common law a man may rightfully change his name, and is bound by contract in his adopted or reputed name. Linton *v.* Bank, 10 Fed. 894.

<sup>4</sup> Converse *v.* Converse, 9 Rich. Eq. 535-570.

<sup>5</sup> Wheeler *v.* Hotchkiss, 10 Conn.

Schuster *v.* Schuster, 93 Mo. 438, 6 S. W. 259; Cull *v.* Brown, 5 Blackf.

309; Moran *v.* Somes, 154 Mass. 200,

28 N. E. 152; Wood *v.* Simons, 20

Mo. 363; Highley *v.* Allen, 3 Mo.

Ap. 521; Dunham *v.* Dunham, 128

Mass. 34; Arrington *v.* Arrington,

102 N. C. 491; Boykin *v.* Rain, 28

Ala. 332; Starr *v.* Pease, 8 Conn.

541; Howey *v.* Goings, 13 Ill. 95;

Hinsman *v.* Bush, 84 Ala. 368; Porte-

ter *v.* Porter, 27 Gratt. 599; Blaker

The husband's title results from the marriage, and his title ceases with a dissolution of the marriage "as certainly and as effectually as it would have terminated by his death."<sup>1</sup> If the husband survives the wife after divorce against either party, he is not a widower, and is not entitled to any part of her estate unless by virtue of some statute changing the common law and giving him that right. So far as her estate is concerned, a divorce operates as the death of the husband.<sup>2</sup> This rule is not changed by the fact that children have been born and the husband is liable for their support. "The death of the wife," it is said, "is one of the four essential requisites to constitute a tenancy by the courtesy." And if she obtains a divorce before her death the estate does not exist.<sup>3</sup> After divorce the wife is entitled to the immediate possession of her property.<sup>4</sup>

But this rule is sometimes changed by statutes which

*v.* Cooper, 7 S. & R. 500; McGrath v. Penn. Life Ins. Co., 8 Phila. 113; Hays *v.* Sanderson, 7 Bush, 489; Townsend *v.* Griffin, 4 Harring. (Del.) 440; Oldham *v.* Henderson, 5 Dana, 254; Burt *v.* Hurlburt, 16 Vt. 292; Mattock *v.* Stearns, 9 Vt. 326; Wright *v.* Wright, 2 Md. 429; Clark *v.* Slaughter, 38 Miss. 64; Davis *v.* Davis, 68 N. C. 180; Sellars *v.* Davis, 4 Yerg. 503.

A husband who acquires property as trustee for the wife has no interest in her real and personal property so held if the wife obtains a divorce. Schoch's Appeal, 33 Pa. 351.

Where a wife obtained a divorce and afterwards inherited slaves, the husband has no interest in them. After divorce she is entitled to all choses in action not previously reduced into possession by him as if she survived him. Wood *v.* Simmons, 20 Mo. 363.

Where a husband has a right under a statute to the use of slaves held by the wife, such right is terminated by a divorce obtained by the wife. Such right, being founded on the continuance of the marriage relation, ceases when the marriage is dissolved by death. Clark *v.* Slaughter, 38 Vt. 64:

By a decree in equity the husband and wife were to receive certain proportions of a fund arising from the sale of land belonging to the wife. The payments were to be received during their "joint lives." Held, that the husband was not entitled to any payments after the wife obtained a divorce. Highley *v.* Allen, 3 Mo. Ap. 521.

<sup>1</sup> Hayes *v.* Sanderson, 7 Bush, 489.

<sup>2</sup> Starr *v.* Pease, 8 Conn. 541.

<sup>3</sup> Wheeler *v.* Hotchkiss, 10 Conn. 225.

<sup>4</sup> Dunham *v.* Dunham, 128 Mass. 34.

either expressly or by inference preserve the right of courtesy after a divorce for the wife's fault. In Illinois this right is held to be preserved by a statute providing that a wife shall not forfeit dower unless the divorce be for her fault, and that "when a divorce is obtained for the fault and misconduct of the husband, he shall lose his right to be tenant by the courtesy in the wife's lands, and also any estate granted therein by the laws of this state."<sup>1</sup> This construction was said to be in conformity to the rule *Expressio unius exclusio alterius*. The legislature, by providing a forfeiture of the estate on divorce for his fault, intended to preserve such estate in all other cases.<sup>2</sup>

**§ 1031. Homestead.**—A homestead is a family residence. As a law term the word denotes a family residence "owned, occupied, dedicated, limited, exempted and restrained in alienability as the statute prescribes."<sup>3</sup> The wife has an interest in the homestead, but it is not a vested interest which will continue after a dissolution of the marriage. During the life of her husband and the continuance of the marriage, she has a right to possession of the property with her husband. If she is guilty of misconduct which is a cause for divorce, the husband may expel her from the residence. She has no right to remain at the homestead if the husband establishes the home elsewhere. Since the homestead estate is the creature of statute, and the family have rights in it, these rights cannot be divested in any other way than authorized by statute. Generally the husband is restrained from conveying the homestead without the consent of the wife. She cannot convey or incumber the homestead without his consent. It will be seen, therefore, that the interest of the wife in the homestead is a mere right of possession and immunity from alienation without her consent. It is not an estate or title, or even an inchoate interest that may

<sup>1</sup> Meacham *v.* Bunting (Ill.), 41 N. E. 178. cases this construction is erroneous. See Wood *v.* Wood in § 1026.

<sup>2</sup> If the legislature believed the estate would continue in all other cases, this construction is erroneous. See Waples, *Homestead and Exemption*.

ripen into an estate, and therefore is not a vested interest. When the marriage is dissolved, the wife has no interest in the homestead, the title to which is in the husband's name.<sup>1</sup> If the title to the homestead is in the wife when the divorce is granted, the husband has no title or right to possession of the homestead after the marriage is dissolved.<sup>2</sup> And the wife can convey the title to the same without the husband joining in the deed.<sup>3</sup>

If the decree is silent as to the title of the homestead the presumption is that the court in adjusting the property rights of the parties permitted the title to remain undisturbed. The holder of the legal title can convey the property as if single; for he has no wife after divorce, and there is no dower right to be released. The law which requires both the husband and the wife to join in the conveyance of the homestead does not apply after the dissolution of the marriage, because the parties ceased to be husband and wife.<sup>4</sup>

This doctrine, that after a dissolution of the marriage the holder of the legal title can convey the same free from all claims of the other party, is directly affirmed in a recent case. The wife procured a decree of divorce awarding her the custody of the children and alimony for the support of herself and children. The husband had the legal title to the homestead, having received a patent from the government under the federal homestead law. After divorce the husband conveyed the homestead to a *bona fide* purchaser for value who had notice of the divorce proceedings. The wife, although living elsewhere, had not abandoned the homestead. After the conveyance of her husband she returned and claimed the property as her homestead, contending that when the decree was rendered, awarding her the

<sup>1</sup> Burns *v.* Lewis, 86 Ga. 591; <sup>3</sup> Burkett *v.* Burkett, 78 Cal. 310. Stahl *v.* Stahl, 114 Ill. 375; Rendle- <sup>4</sup>The decree *a mensa* does not man *v.* Rendleman, 118 Ill. 257. have this effect. Castlebury *v.*

<sup>2</sup> Dunham *v.* Dunham, 128 Mass. Maynard, 95 N. C. 281.

custody of the children, she became the head of the family, and that she did not, by obtaining a divorce for the husband's misconduct, lose her homestead right. But it was held that the statute permitting the court to assign the homestead to the innocent party did not thereby convey the title, but expressly provided that the court might dispose of it by decree. "We deem it better for the innocent party," said the court, "better for the fee-owner, better as a rule of property, that the interest of the respective parties in the homestead should be fixed by the decree in the divorce proceeding; and, when that decree is silent, the homestead, like all other realty, must remain in possession of the party holding the record title, discharged of all homestead rights and claims of the other party; and this we deem the result of the better authorities."<sup>1</sup> If the homestead is community property, the parties become tenants in common after divorce if the decree is silent as to such property. Each may then convey whatever interest he or she has in the community property.<sup>2</sup> If the divorced husband convey the homestead by deed of trust, the creditor is entitled to a partition to recover the husband's portion of the property, but the wife's interest is exempt.<sup>3</sup> If the homestead is held by the husband and wife by entirieties, the wife may plead her exemption against her husband's creditors where the homestead was assigned to her after divorce.<sup>4</sup>

But it seems clear that the divorced wife, although she has no title in the homestead which is in her husband's name, may claim the property as exempt from the claims of her husband's creditors if she remains upon the property with the children. The husband is still liable for the support of the children, and his property is exempt so long as

<sup>1</sup> *Rosholt v. Mehus*, 3 N. D. 513, Chalfant, 47 Cal. 432; *Gimmy v. Doane*, 22 Cal. 638. 57 N. W. 783.

<sup>2</sup> *Simpson v. Simpson*, 80 Cal. 237; <sup>3</sup> *Kirkwood v. Domnau*, 80 Tex. *Grupe v. Byers*, 73 Cal. 271; *Stockton v. Knock*, 73 Cal. 425; *Lowell v. Lowell*, 55 Cal. 316; *Shoemake v. Lowell*, 16 S. W. 428; *Trigg v. Trigg* (Tex.), 18 S. W. 313.

<sup>4</sup> *Jackson v. Shelton*, 89 Tenn. 82, 16 S. W. 142.

he must furnish such support. His family still reside on the homestead, and its exempt character is not changed by the divorce or the subsequent desertion of the family by the husband. The conservation of the home, the object of the homestead law, requires that the exemption continue.<sup>1</sup> Where the family remain upon the homestead, and the wife is awarded the custody of the children, the homestead is exempt. "The spirit and policy of the homestead act regard . . . (the divorced wife) as a widow and the head of a family."<sup>2</sup>

The homestead referred to is the real estate occupied by the family and protected by law from sale by execution. It is intended as a home for the family, for the children as well as the wife. If the marriage is dissolved, it may continue to be the home of the husband and the children, and then it should be protected against all claims, even from sale by execution to pay a decree for alimony. If the custody of the children is awarded to the wife, and she resides elsewhere, the homestead is still exempt from her decree for alimony, because the husband is liable for the support of the children, and should be allowed to retain the homestead for this purpose. The husband's right to the homestead is not destroyed by divorce in such case, but continues the same as though the wife had died or deserted, leaving the children under his care. He remains the head of a family within the meaning and spirit of the homestead law.<sup>3</sup> The liability of the homestead, in such case, must be fixed by the decree of divorce. If the wife receives a general judgment for alimony and the same is not declared a lien on the homestead, she cannot have the homestead sold under her judgment.<sup>4</sup> In New Hampshire the homestead is said to belong

<sup>1</sup> *Blandy v. Asher*, 72 Mo. 27.      268; *Woods v. Davis*, 34 Ia. 264;

<sup>2</sup> *Van Zant v. Van Zant*, 23 Ill. Hemenway *v. Wood*, 53 Ia. 21.

536; *Bonnell v. Smith*, 53 Ill. 375;      <sup>4</sup> *Byers v. Byers*, 21 Ia. 268; *Philbrick v. Andrews*, 8 Wash. 7;  
*Sellon v. Reed*, 5 Biss. 125.

<sup>3</sup> *Biffle v. Pullman*, 114 Mo. 50, 21 S. W. 450; *Byers v. Byers*, 21 Ia.

Hemenway *v. Wood*, 53 Ia. 21.

to the wife and children; and in case of divorce obtained by the wife, the husband is barred of the right of homestead, and the property may be sold under her decree for alimony, if the children do not reside upon the property with their father.<sup>1</sup> Where there are no children the husband cannot claim the homestead exemption against an execution on a general decree for alimony. The exemption law, in such case, has no more application than it would have in an ordinary suit in partition.<sup>2</sup>

If the title to the homestead is in the husband's name, the court, when granting a decree of divorce, may decree the possession to the wife and require the husband to vacate it. While it is true that the wife has no title and no interest in the homestead except that derived from marriage, it does not follow that a decree should deprive her of all support. If a decree will extinguish all her interest in the property and leave the husband the absolute owner, this is but another reason why her interests should be protected by the decree. The rights to the homestead are equal. Before divorce neither party could sell or incumber the property without the consent of the other. Both are entitled to possession, and either may claim the exemption. But a decree of divorce justifies the parties in living apart, and the law does not intend that both shall have possession of the homestead after the marriage is dissolved. The court may award the homestead to the wife if the statute permits a distribution of the property.<sup>3</sup> Or if the circumstances require a different settlement, the court may decree possession to the husband subject to the lien of a judgment for alimony.<sup>4</sup> Or the court may allow the wife to have possession of the homestead for life,<sup>5</sup> or for a period of years.<sup>6</sup>

<sup>1</sup> *Wiggin v. Buzzell*, 58 N. H. 329. See, also, *Heaton v. Sawyer*, 60 Vt.

<sup>4</sup> *Blankenship v. Blankenship*, 19 Kan. 159.

495; *Whiteman v. Field*, 53 Vt. 554.

<sup>5</sup> *Tiemann v. Tiemann*, 34 Tex. 522.

<sup>2</sup> *Mahoney v. Mahoney* (Minn.), 61 N. W. 334.

<sup>6</sup> Where the homestead was as-

<sup>3</sup> *Brandon v. Brandon*, 14 Kan. 342; *Leach v. Leach*, 46 Kan. 724.

signed to the innocent party for a period of ten years, such estate ter-

**§ 1032. Federal homestead.**—The public lands of our nation are granted by act of congress to actual settlers upon certain conditions, such as residing upon and cultivating the land for a period of years. During the time of such occupancy the husband has no vested interest in the land, but a mere right to maintain possession until he can comply with the law. No title passes to the husband until he complies with the law. If before the title has passed to the husband the marriage is dissolved, the wife loses all interest in the homestead.<sup>1</sup>

**§ 1033. Effect of decree obtained in another state on constructive service.**—Where the husband obtains a decree of divorce in another state upon constructive service, and the wife did not appear in the proceeding, the decree so obtained is valid so far as it affects his *status*, and the necessary conclusion is that, as the husband has no wife, the wife ceases to have a husband. The marriage relation is dissolved, and the wife loses all her interest in his property, including her dower.<sup>2</sup> This is the result of the two well-established principles of law, that each state can regulate the *status* of its own citizens, and that the marriage relation is dissolved when one party is lawfully divorced. The decree of another state is a bar to dower because it dissolved the marriage and terminated all non-vested interests depending upon the cov-  
erture.<sup>3</sup>

It is to be regretted that the law should, by operation of its fixed rules, place the wife in such a condition that she is condemned without a hearing, found guilty without a trial,

minates upon the death of the party within the period, as the court has no power to assign the homestead for a greater period than the life of the party. *Neary v. Godfrey*, 102 Cal. 388, 36 P. 655.

<sup>1</sup> *Maynard v. Hill*, 125 U. S. 190, 8 Supt. Ct. R. 723, 2 Wash. Ter. 321; *McSorley v. Hill*, 2 Wash. St. 638, 27 P. 552.

<sup>2</sup> *Hood v. Hood*, 110 Mass. 463; *Marvin v. Marvin*, 59 Ia. 699; *Boyles v. Latham*, 61 Ia. 174; *Gould v. Crow*, 47 Mo. 200; *Rendleman v. Rendleman*, 118 Ill. 260; *Arrington v. Arrington*, 102 N. C. 491; *Chapman v. Chapman*, 48 Kan. 636, 29 P. 1071.

<sup>3</sup> *Hawkins v. Ragsdale*, 80 Ky. 353; *Gould v. Crow*, 57 Mo. 200.

and deprived of her property without a day in court. But the only avenue of escape is to provide by appropriate legislation that such decree shall not be a bar to the wife's suit for dower, or by permitting a subsequent suit for divorce after a decree has been obtained in another state.<sup>1</sup>

To relieve the wife from the harshness of this rule the courts have sometimes refused to recognize an *ex parte* decree of divorce rendered in another state as a bar to the wife's suit for dower. Various excuses and evasions have been resorted to, some of them not very creditable to the courts. In one case it was said, "By our law, when a divorce is decreed, both parties are absolved from the obligations of the marriage contract. In looking into the decree in the present case, however, I find that although John Mansfield is divorced from his wife she is not, *in terms*, released from any of her obligations to him. For aught that appears in the decree she still continued to be his wife."<sup>2</sup> It is submitted that this is mere evasion; as the court must have known that a decree need not recite all the consequences which must flow from it. This case is weak and unsound, and has since been repudiated by allowing the wife to recover dower on a decree of another state under a provision of statute.<sup>3</sup> In a recent case in the same state the decree of another state was held void because it did not appear to have been granted for causes which are causes for divorce in Ohio. "But if it were otherwise," said the court, "as she had no opportunity to defend, all that can be claimed for that decree is that it dissolved the marriage relation between the parties, and restored the husband to the *status* of an unmarried man. This the court could do. But, as it had no jurisdiction of the person of the wife, it was not competent to the Indiana court to affect such rights as she had acquired in the property of the husband under the

<sup>1</sup> See proceedings in Van Inwagen v. Van Inwagen, 86 Mich. 21. 333, 49 N. W. 154.

<sup>2</sup> Mansfield v. McIntire, 10 Ohio, 21. <sup>3</sup> McGill v. Deming, 44 O. St. 645.

laws of this state.”<sup>1</sup> This doctrine is illogical and unsound. Admitting that such decree dissolved the marriage relation, it must follow that the inchoate right of dower terminated with the relation upon which it depends.

The courts of Pennsylvania hold that no interstate comity requires that an *ex parte* decree of divorce obtained in another state shall be a bar to dower, because the rights of the wife and of the state have not been adjudicated. In one case the court said that, “By marriage the wife has claims upon the husband’s property here, and the law of Pennsylvania has claims to apply it to her support, as one of its married citizens. On what principle of right or of comity shall the decree of a distant tribunal, never having acquired jurisdiction from domicile, or otherwise, over her, cut loose those claims and enable Pennsylvania from taking the property of the husband within her borders, to lift the burden of support from the public shoulders; or from rendering to the wife judicially that right which she has in her husband’s property, and which he neither carried away with him nor defeated by his removal? To admit the greater right of the foreign decree is to derogate from our own sovereignty and to withdraw from one of our own citizens the protection due her. No correct principle of interstate law can demand this.”<sup>2</sup> In New York the decree of another state rendered by a court having jurisdiction over both parties, and on the ground of the wife’s adultery, will probably bar dower, although this point has not been determined. It is held that the effect which a decree of divorce, granted in another state, has upon lands in New York is determined by its own laws and not by the laws of the state where the decree was rendered, and that an absolute divorce rendered in another state for desertion would not bar dower in New York. The statute of this state provides that “In case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.” The miscon-

<sup>1</sup> *Doerr v. Forsythe*, 50 Ohio, 726,      <sup>2</sup> *Colvin v. Reed*, 55 Pa. 375. See, 35 N. E. 1055. also, *Reel v. Elder*, 65 Pa. 308.

duct referred to is held to be adultery, as this is the only cause for absolute divorce. Accordingly it is held that where the husband obtains a decree in another state dissolving the marriage on the ground of desertion, such decree, though valid in every respect, will not deprive the wife of dower.<sup>1</sup>

In South Carolina it is held that marriage is a contract between the husband and wife, and a court has no jurisdiction to annul the contract or dissolve the marriage without jurisdiction over both parties. A decree of another state, based upon constructive service, is therefore invalid, and will not bar dower in lands situated in that state.<sup>2</sup>

After the wife has recovered a divorce in one state she may recover dower in another state where it is provided by statute that upon the dissolution of the marriage the wife shall be entitled to dower as though the husband were dead. Such statute does not require the divorce to be granted within the state. This was decided in an early case in Maine. The husband deserted his wife in Maine, and went to North Carolina, where he committed adultery. The wife removed to Rhode Island, and obtained a decree dissolving the marriage on account of his adultery, he having been personally cited to appear. Such divorce was held valid in Maine, and entitled her to dower in his lands. The court said: "If the divorce decreed in Rhode Island is valid here, the remaining question is whether the wife was entitled to dower in any estate of inheritance of which the husband was seized during coverture. The statute allows it in the lands of the husband where a divorce is de-

<sup>1</sup> *Van Cleaf v. Burns*, 118 N. Y. "adultery" would have been used 549, 23 N. E. 881, reversing 43 Hun, instead of "misconduct."

461; on second appeal, *Van Cleaf v. Burns*, 133 N. Y. 540, 30 N. E. 661, reversing 16 N. Y. Supp. 667. It is submitted that this opinion is erroneous and unsound. If the statute referred to decrees rendered in New York, the word

<sup>2</sup> *McCreery v. Davis* (S. C.), 22 S. E. 178. This opinion announces doctrines which have been obsolete for nearly a century. It does not appear that the cases cited in this section were considered by the court.

creed for the cause of adultery committed by the husband, to be assigned in the same manner as though he were dead. The language is general, and is not limited to divorces within the state."<sup>1</sup> This interpretation was followed in Ohio in a similar case. There was nothing in the statute incompatible with extending its provisions to decrees of another state, and nothing to indicate that it was the intention of the legislature to restrict its provisions to divorce by local courts only.<sup>2</sup> It is clear that the foreign divorce will be given the same effect as the domestic divorce, and not the effect which the foreign divorce had in the state where it was rendered. The law of the state in which the land is situated will control as to the effect of the foreign divorce upon dower.<sup>3</sup>

<sup>1</sup> *Harding v. Alden*, 9 Greenl. *v. McIntyre*, 10 O. St. 27; *Hawkins v. Ragsdale*, 80 Ky. 353. (Me.) 140.

<sup>2</sup> *McGill v. Deming*, 44 O. 645, 11 N. E. 118, distinguishing *Mansfield* 983. <sup>3</sup> *Thoms v. King* (Tenn.), 31 S. W.

## ANNULLING DECREE FOR FRAUD.

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§ 1050. In general.

- 1051. False or insufficient evidence.
- 1052. Fraud in concealing proceedings and preventing defense.
- 1053. Whether decree vacated after one party has married.

§ 1054. The death of one of the divorced parties is not a bar.

- 1055. When parties are bound by a decree obtained by collusion.
- 1056. Delay and estoppel.
- 1057. Procedure in vacating decree obtained by fraud.

**§ 1050. In general.**—The maxim that “fraud vitiates everything” is applicable to decrees of divorce. There are, however, some difficulties in the way that may prevent the court from vacating a decree of divorce. A judgment which affects but two parties may be set aside without serious consequences to any one but the plaintiff; but if a decree of divorce is vacated innocent parties may be wronged, and the marriage relation as a public institution will be disturbed. These considerations once compelled a court to hold, though reluctantly, that “sound public policy, in this class of cases, forbids us from setting aside a decree of divorce,” although an original bill was filed at a subsequent term alleging fraud and false testimony.<sup>1</sup> But such considerations are outweighed by other considerations of public policy. There is much greater danger of fraud in divorce cases than in other cases, and experience has shown that the temptation is great and fraudulent decrees are frequent. Public

<sup>1</sup> Parish *v.* Parish, 9 O. St. 534. This decision is under a statute providing that “no appeal shall be obtained from the decree, but the same shall be final and conclu-

sive.” The opinion has been characterized as an apology “in behalf of the legislature for enacting such an immoral statute.”

policy requires that, as a general rule, the courts may protect themselves by vacating decrees obtained by fraud, although the rights of innocent parties may sometimes be sacrificed. It is essential to the due administration of justice that the courts may protect themselves and the parties before them from fraud and imposition. It is, however, a power which must be exercised with great discretion and only upon thorough investigation of the facts. If an innocent party has married one of the divorced parties, the court should refuse the application if the motive is to obtain alimony or some pecuniary advantage. In no case should the court grant relief where the applicant has accepted the benefits of the decree in any way by receiving alimony or by treating the decree as valid and marrying another. The rule that unreasonable delay will bar the vacation of a decree for fraud should be rigidly enforced. The application to vacate a decree will be denied where the applicant is guilty of any conduct creating an estoppel:

Legislation in some of the states will prevent the court from vacating a decree of divorce after the term in which it was entered.<sup>1</sup> But in the absence of statutory provisions on the subject the court may exercise its inherent power to vacate its own decrees where they have been obtained by fraud; and the authorities are now unanimous that such power may be exercised in vacating decrees of divorce after the term in which they were rendered.<sup>2</sup> Although the stat-

<sup>1</sup> *Salisbury v. Salisbury*, 92 Mo. 439; *R. v. R.*, 20 Wis. 331; *Johnson* 683; *Childs v. Childs*, 11 Mo. Ap. v. *Coleman*, 23 Wis. 452; *Crouch v.* 395; *Nave v. Nave*, 28 Mo. Ap. 505; *Crouch*, 30 Wis. 667; *Boyd's Ap-* *Ficener v. Ficener* (Ky.), 3 S. W. 597; *Parish v. Parish*, *supra*. *But* *peal*, 38 Pa. 241; *Fidelity Ins. Co.'s Appeal*, 93 Pa. 242; *Young v. Young*, see, *contra*, *Earle v. Earle*, 91 Ind. 17 Minn. 181; *True v. True*, 6 Minn. 27, overruling *McQuigg v. Mc-* 315; *Holmes v. Holmes*, 63 Me. 420; *Quigg*, 13 Ind. 294; *Hoffman v. Hoff-* *Wisdom v. Wisdom*, 24 Neb. 551; *man*, 15 Ind. 278; *Rindge v. Rindge*, *Smithson v. Smithson*, 37 Neb. 535, 22 Ind. 31; *Ewing v. Ewing*, 24 Ind. 56 N. W. 300; *Rush v. Rush*, 46 Ia. 468. *Whitcomb v. Whitcomb*, 46 *468*.

<sup>2</sup> *Adams v. Adams*, 51 N. H. 388; *Ia. 437*; *Getcher v. Getcher*, 51 Md. *Weatherbee v. Weatherbee*, 20 Wis. 187; *McMurray v. McMurray*, 67

ute prohibits the review of a divorce suit on appeal, the court may exercise this inherent power where the divorce was obtained by fraud.<sup>1</sup> In a case in which the power of a court of equity to vacate a decree of divorce was questioned, Bigelow, C. J., stated that it was "an established principle of jurisprudence that courts of justice have power, on due proceedings had, to set aside or vacate their judgments and decrees, whenever it appears that an innocent party without notice has been aggrieved by a judgment or decree obtained against him without his knowledge, by the fraud of the other party. Nor is this principle limited in its application to courts which proceed according to the course of the common law. It is equally applicable to courts exercising jurisdiction in equity, and to tribunals having cognizance of cases which are usually heard and determined in the ecclesiastical court. In tribunals of the last named description, whose decrees cannot be revised by writ of error or review, the proper form of proceeding is by petition to vacate the former decree as having been obtained by fraud upon the party and imposition upon the court.<sup>2</sup>

**§ 1051. False or insufficient evidence.**—In all cases where a decree of divorce has been obtained by false or insufficient evidence, it will be vacated on the usual application and showing of the facts, as in other cases. Owing to the interest of the state, a decree upon default will be set aside in some instances where the showing would be considered insufficient in ordinary cases.<sup>3</sup> It is an open question whether fraud consisting of false and perjured testimony as to proof of the cause of action is sufficient cause for vacating the ordinary decree.<sup>4</sup> The general rule in the case of ordinary

Tex. 665, disapproving *Green v. Green*, 2 Gray, 361. constructive service will be vacated, see § 825.

<sup>1</sup> *Mansfield v. Mansfield*, 26 Mo. 163.

<sup>3</sup> See Default, § 775.

<sup>2</sup> *Edson v. Edson*, 108 Mass. 590. When default will be set aside, see § 775. When decree based on

<sup>4</sup> The decree of another state is also open to collateral attack for fraud. See cases cited in § 560. *Dunham v. Dunham*, 57 Ill. Ap. 475.

judgments is that the fraud for which a judgment may be vacated in equity must be in the procurement of the judgment, in preventing a defense, or in a false showing of the jurisdictional facts. But fraud in the cause of action is not sufficient.<sup>1</sup> This rule has been applied to actions to impeach decrees of divorce. Thus a wife cannot, in a collateral proceeding in the same state, impeach a decree for divorce obtained by the husband by false testimony and perjury as to the cause for divorce.<sup>2</sup> The remedy in such case is a direct proceeding to vacate the judgment.<sup>3</sup> In a recent case the heirs of the husband brought an action to vacate a decree of divorce on the ground that the parties were not lawfully married; that the husband was insane and incapable of assenting to the marriage; that the husband at the time of the marriage had a wife living and not divorced, and that the allegations in the petition for divorce were false. It was held that this action would not lie, as it was not based on any fraud in the procurement of the decree.<sup>4</sup>

There is, however, some authority for a collateral attack of a decree of divorce on the ground of fraud in the cause of action. A wife, during the absence of her husband, obtained a decree of divorce on the ground of desertion. The decree was in regular form, was based upon constructive service, and it was admitted that the court had jurisdiction. The decree granted the wife certain slaves which she sold. The husband brought an action against the wife and the purchasers to recover the slaves on the ground that the decree was void for fraud and collusion of the witnesses as to the cause for divorce. The bill was sustained, although the dissenting opinion in the case clearly pointed out the distinction between direct and collateral attack.<sup>5</sup>

<sup>1</sup> Freeman on Judgments, § 489.

<sup>4</sup> Richardson *v.* Stowe, 102 Mo. 33.

<sup>2</sup> Greene *v.* Greene, 2 Gray, 361; Nicholson *v.* Nicholson, 113 Ind. 181.

<sup>5</sup> Plummer *v.* Plummer, 37 Miss. At., § 550, citing above cases.

<sup>3</sup> Id.

**§ 1052. Fraud in concealing proceedings and preventing defense.**—Any conduct of the plaintiff which conceals notice of the proceedings or prevents the defendant from making a defense is a fraud upon the administration of justice as well as upon the defendant, and a decree so procured will be set aside. The fraud is complete where the husband sends his wife out of the state and obtains service by publication, and conceals from her all notice of the proceedings, although he continues to correspond with her.<sup>1</sup> This is a fraud upon the court, which will for its own protection set aside the decree without a showing of a defense to the action, which would be required where the fraud was practiced upon the party alone. A decree will be set aside where the defendant was prevented from making a defense by relying upon the plaintiff's promise that the suit will be dismissed.<sup>2</sup> Where the wife testifies that the husband promised to dismiss the suit and the husband denies such agreement, the decree will not be vacated unless the wife is corroborated by others or by circumstantial evidence, as that the parties lived together as husband and wife after the commencement of the suit for divorce.<sup>3</sup> A decree will be set aside where it was obtained after the parties had entered into a stipulation to dismiss the suit and the offense had been condoned.<sup>4</sup>

It is also a fraud to conceal all the proceedings by commencing the suit in a county where neither of the parties resides.<sup>5</sup> In a recent case the wife filed an answer, and her attorney was notified that he would receive notice of any further proceedings in the case. Subsequently this suit was dismissed without notice to her attorney, and an action was brought in another county, where service was had by publi-

<sup>1</sup> *Whitcomb v. Whitcomb*, 46 Ia. 437; *Everett v. Everett*, 60 Wis. 200; *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342. See, also, *Babbitt v. Babbitt*, 69 Ill. 277. For sufficiency of petition to vacate decree in such cases, see *Colby v. Colby* (Minn.), 61 N. W. 460.

<sup>2</sup> *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223.

<sup>3</sup> *Scanlan v. Scanlan*, 41 Ill. Ap. 449.

<sup>4</sup> *Thelin v. Thelin*, 8 Ill. Ap. 421.

<sup>5</sup> *Edson v. Edson*, 108 Mass. 590; *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342.

cation and by mailing a copy of the summons and complaint to a false address, where defendant would receive no notice of the proceedings. In the second suit the plaintiff concealed from the court all the facts concerning the former action and procured a decree of divorce. This decree was held void on account of fraud in concealing the proceedings and suppressing the facts from the court.<sup>1</sup> A decree will be set aside for fraud where the order for publication is obtained by a false affidavit, as where plaintiff swears she does not know the defendant's address, when the address is known to her.<sup>2</sup> Fraud in obtaining a divorce in the name of the other party will vitiate the decree, as where the husband procures the divorce against himself as defendant without the knowledge of the wife.<sup>3</sup> A decree was set aside where the husband induced the wife to go to Canada under promise that they would live together when she had been cured of a venereal disease. She was served with summons on her way out of the state and admonished by her husband to keep the matter quiet on account of public scandal. He continued to correspond with her in a friendly manner, but made no reference to the divorce suit. The wife was ignorant of her rights and was under the control of the husband, and relied upon his promise to live with her at some future time. These facts were held sufficient, and the decree was opened and the wife was allowed to plead the connivance of her husband and that the offense had been condoned.<sup>4</sup> A remarkable case of fraud occurred in New York, where the husband induced the wife to go to California, and as he left her on board the steamer at the last moment before its departure, he delivered to her a sealed box, which, he informed her, contained a present to her mother in Cali-

<sup>1</sup> *Yorke v. Yorke* (N. Dak.), 55 N. W. 1095.

<sup>3</sup> *Sloan v. Sloan*, 102 Ill. 581; *Olmstead v. Olmstead*, 41 Minn. 297, 43 N. W. 67; *Brown v. Grove*, 116 Ind.

<sup>2</sup> *Crouch v. Crouch*, 30 Wis. 667; *Britton v. Britton*, 45 N. J. Eq. 88;

84, 18 N. E. 387.

*Holmes v. Holmes*, 63 Me. 420; *Adams v. Adams*, 51 N. H. 388.

<sup>4</sup> *Young v. Young*, 17 Minn. 181.

fornia. The box contained a summons in a suit for divorce, but the wife did not discover the fact in time to return. The decree was vacated and the plaintiff charged with perjury.<sup>1</sup>

**§ 1053. Whether decree vacated after one party has married.**—Where the fraud has induced the court to render the decree, when in fact it had no jurisdiction, it must be conceded that the judgment is void, and when the truth is made to appear the decree must be vacated, although an innocent third person has married one of the divorced parties.<sup>2</sup> It is not disputed, if the plaintiff procures a decree by fraud in concealing the proceedings or preventing a defense, the fact that he has married again will not deprive the court of the power to render justice and vacate the decree.<sup>3</sup> The true reason of the law is that public policy requires that the court must be free to protect itself and innocent persons from fraud. The exercise of such power cannot, in the nature of the case, be prevented by the guilty party subsequently committing a more grievous fraud in inducing an innocent party to marry him. To adopt a policy that a decree could not be vacated for fraud after a second marriage was contracted in good faith would encourage fraud by placing it in the power of the guilty party to prevent all disturbance of the fraudulent decree. It would allow him to take advantage of his own wrong. Shrewd and unscrupulous attorneys could assure their dishonest clients that a

<sup>1</sup> *Bulkley v. Bulkley*, 7 Abb. Pr. Rep. 307. *Caswell v. Caswell*, 24 Ill. Ap. 548; *Scanlan v. Scanlan*, 41 Ill. Ap. 449;

<sup>2</sup> *Stephens v. Stephens*, 62 Tex. 337; *Whitcomb v. Whitcomb*, 46 Ia. 437; *Holmes v. Holmes*, 63 Me. 420; *Yorke v. Yorke* (N. Dak.), 55 N. W. 1095; *Caswell v. Caswell*, 120 Ill. 377; *Edson v. Edson*, 108 Mass. 590. *Wortman v. Wortman*, 17 Abb. Pr. 66; *Weatherbee v. Weatherbee*, 20 Wis. 499; *True v. True*, 6 Minn. 315; *Everett v. Everett*, 60 Wis. 200; *Crouch v. Crouch*, 30 Wis. 667; *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. 341; *Wisdom v. Wisdom*, 24 Neb. 551; *Brotherton v. Brotherton*, 12 Neb. 72; *Olmstead v. Olmstead*, 41 Minn. 297.

<sup>3</sup> *Allen v. McClellan*, 12 Pa. St. 328; *Boyd's Appeal*, 38 Pa. 241; *Comstock v. Adams*, 23 Kan. 513; *Smith v. Smith*, 20 Mo. 167; *Cas-*

hasty marriage will make the fraud successful beyond all question. Such a policy would add another iniquity to the *ex parte* divorce, which is already a disgrace to our laws and a reproach upon the administration of justice. The rights of the innocent third person must, in this instance, yield to the paramount right of the state to so administer justice as to prevent fraud and protect the marriage relation.

But as the laws proceed, in such cases, upon reasons of public policy, the decree will not be vacated where other considerations of public policy intervene. The state is interested in the preservation of a marriage after a lapse of time, in the security of titles and property rights, and in the legitimacy of children; and where the defrauded party has delayed in asserting her rights for an unreasonable time the decree should not be disturbed. If the defrauded party could have prevented the second marriage the application comes too late. Every principle of estoppel and laches should be applied to defeat the party complaining of fraud where a second marriage has taken place. If the defrauded party has withdrawn from cohabitation and lives in another state, she has, to some extent, placed it in the power of her husband to commit the fraud; and, as against the rights of the second wife, the rule of equity that "where one of two innocent parties must suffer from fraud, the party who placed it in the power of the third party to commit the fraud must suffer," should be applied. One who has renounced the marital relation for years comes in bad grace to assert marital rights. If she has relied upon the decree, accepted its benefits and married again, she cannot have the decree vacated, although the decree was obtained by fraud or is void for want of jurisdiction.<sup>1</sup>

<sup>1</sup> Richardson *v.* Richardson, 132 Pa. 292, 19 A. 82; Ellis *v.* White, 61 Ia. 644; Elliott *v.* Wohlfom, 55 Cal. 384; Loud *v.* Loud, 129 Mass. 14; Richeson *v.* Simmons, 47 Mo. 20; Ellis *v.* Ellis (Minn.), 56 N. W. 1056; Marvin *v.* Foster (Wis.), 63 N. W. 484; Mohler *v.* Shanks' Estate (Ia.), 61 N. W. 981. See *contra*, Rundle *v.* Van Inwegan, 9 Civil Pro. (N. Y.) 328.

**§ 1054. The death of one of the divorced parties is not a bar.**— A decree obtained by fraud will be vacated although one of the divorced parties is dead.<sup>1</sup> The same rule of public policy that requires the decree to be vacated although a second marriage has taken place will require the same relief although one of the parties is dead. The proceeding will be a mere contest for property; for if the decree is vacated the survivor cannot be restored to marital rights. The fact that the party is dead who is alleged to have procured the decree by fraud should justify the court in requiring clear and satisfactory evidence of the fraud, for the dead can make no denials or explanations.

After the death of one of the parties the other is incompetent to testify against deceased in a suit to set aside a decree on account of fraud.<sup>2</sup>

Where the application is made after the death of the party guilty of fraud, it seems that both the administrator and the heirs of the deceased should be made parties. The interests of the heirs are not identical with that of the administrator, and the decree should be final as to the interests of all parties when it is certified to the probate court before the estate is settled.<sup>3</sup>

**§ 1055. When parties are bound by a divorce obtained by collusion.**— Where the parties have obtained a decree of divorce by entering into an agreement to suppress evidence, or to not interpose a defense, or by other collusive agree-

<sup>1</sup>Rawlins *v.* Rawlins, 18 Fla. 345; Johnson *v.* Coleman, 23 Wis. 452; Brown *v.* Grove, 116 Ind. 84; Fidelity Ins. Co.'s Appeal, 93 Pa. 242; Bomsta *v.* Johnson, 38 Minn. 230; Boyd's Appeal, 38 Pa. 241.

<sup>2</sup>Fidelity Ins. Co.'s Appeal, 93 Pa. 242. But see *contra*, Brown *v.* Grove, 116 Ind. 84.

<sup>3</sup>Bomsta *v.* Johnson, *supra*. In Johnson *v.* Coleman, 23 Wis. 452, the court held that both the heir and the administrator should be joined

where the complainant seeks to have the judgment declared void. "If that judgment should be declared void and of no effect, it would open the door for the widow to come in and claim her share of the estate, and thus the heir would be deprived of a portion of the inheritance. The pecuniary interest of the heir, therefore, is opposed to the application and to granting the relief asked in the complaint."

ments, they will be bound by the decree, and the wife cannot plead her own collusion as a fraud upon the court in order to have the decree vacated and additional alimony granted to her.

Although such decree is a fraud upon the court, and therefore against public policy, in some cases the decree will not be disturbed, because it would be much more against public policy to relieve parties who are *in pari delicto*, or to allow the wife to profit by her collusion.<sup>1</sup> A decree will not be vacated where the wife agrees to permit the husband to procure a divorce on the ground of her adultery, in consideration that the husband pay her a sum of money and convey to her certain real property, which he refuses to do after obtaining the divorce. If the decree was vacated and the wife allowed to interpose her defense, "she would occupy a more advantageous position from which to renew her demand for money, and perhaps, profiting by her experience, negotiate for another collusive divorce upon a cash-in-hand basis."<sup>2</sup> Whether right or wrong the parties cannot be relieved from a shameless bargain to deceive the court.<sup>3</sup>

In some instances the decree will be vacated where the wife is an unwilling party to the collusion, and participated in it under the coercion of the husband because she was weak and helpless. Then the collusion becomes a form of force and fraud. A decree will be vacated where the wife is compelled to sign the petition for divorce against the husband; or where the wife, while in a weak and helpless condition, is brought into the state, and compelled to accept service of a summons upon the understanding that the decree will be for desertion, and the husband obtains a decree for adultery, and deprives her of her right of dower.<sup>4</sup>

Collusion of the parties in going to another state to pro-

<sup>1</sup> Nichols *v.* Nichols, 25 N. J. Eq. 60; Singer *v.* Singer, 41 Barb. 139. Orth *v.* Orth, 69 Mich. 158, 37 N. W. 57.

<sup>2</sup> Hubbard *v.* Hubbard, 19 Colo. 13, 34 P. 170. Olmstead *v.* Olmstead, 41 Minn. 297, 43 N. W. 67.

<sup>3</sup> Simons *v.* Simons, 47 Mich. 253; Daniels *v.* Benedict, 50 Fed. 347-

cure a divorce will prevent either of the parties from showing, in a subsequent proceeding, that the decree was void for lack of jurisdiction. Neither of the parties can complain of mutual fraud upon the court. The party who invoked the aid of the court cannot be heard to question its jurisdiction.<sup>1</sup> This is a form of estoppel similar to that which prevents a party from attacking the validity of a judgment after he has accepted the benefits of it. The decree, which is void for lack of jurisdiction over the subject-matter, must always remain so, and no act of the parties can invest it with the force and validity of a decree rendered by a court of competent jurisdiction. Although it is a nullity, the law refuses all relief concerning it and binds the parties by their collusive agreement. But the novel and erroneous doctrine is announced in Minnesota that a decree of divorce obtained by collusion in another state where neither of the parties is domiciled, and consequently the court has no jurisdiction over the subject-matter, is valid as to the parties, but void as to the state of their residence. The facts were that the wife, in applying to be appointed administratrix of her former husband's estate, offered to show that she was the wife of deceased, and that his second marriage was void because the decree of divorce which she had obtained in Wisconsin was void for the reason that at the time it was rendered she and her husband were residents of Minnesota, and consequently the court in Wisconsin had no jurisdiction. This offer of proof was refused because the decree was valid as to the parties, and the rule was announced that "while the state cannot be bound by its resident citizens appearing in and consenting to the jurisdiction of a court in another state in an action for divorce, the parties may bind themselves in respect to their individual interests. . . . It may seem anomalous that a judgment of divorce can be so far effectual between the parties as to extinguish all rights of property dependent on the marriage relation, without being effectual to protect them from accountability to the

<sup>1</sup> Feyh's Estate, 5 N. Y. Supp. 90.

state for their subsequent acts. One reason why they ought not to be permitted, by going into and procuring a divorce, to escape accountability to the laws of their state, is that their act is a fraud upon the state, and an attempt to evade its laws, to which it in no wise consents, and it may therefore complain. But the parties consent, and why should they be heard to complain of the consequences to them of what they have done? Why should they be permitted to escape these consequences by saying: ‘It is true that by a false oath made by one of us, and connived at by the other, we committed a fraud in the Wisconsin court and induced it to take cognizance of the case; but now we ask to avoid its judgment by proof of our fraud and perjury or subordination of perjury.’ Because we do not think this can be done, the parties must, so far as their individual interests are concerned, abide by the judgment they procured that court to render; and, of course, what will bind them will bind those who claim through them.” The order appointing the second wife administratrix was then affirmed.<sup>1</sup> So far as this opinion asserts the validity of this collusive decree, it is clearly wrong, because the fundamental principle of jurisdiction is overlooked. Jurisdiction over the subject-matter cannot be conferred by consent of the parties. The same result could have been reached by holding the decree void for lack of jurisdiction, and that the wife was estopped from attacking the decree by her fraud and collusion, by accepting the alimony awarded by it, and by permitting the decree to remain in force until the husband had married again.

**§ 1056. Delay and estoppel.**—It is a familiar principle of law that the party who seeks relief from fraud must proceed promptly upon the discovery of the fraud, and an unexplained acquiescence or delay after he has knowledge of the facts will deprive him of his rights. This rule is especially applicable to a party seeking to vacate a decree of divorce on the ground of fraud; for an innocent person relying upon the decree may marry the divorced party, and to vacate

<sup>1</sup> *Ellis v. Ellis* (Minn.), 56 N. W. 1056.

the decree will deprive the second wife and her children of property rights and legal *status*. The defrauded party, after discovering the fraud, cannot wait until a second marriage takes place and assert her rights to the injury of others. If a second marriage takes place after an unreasonable delay of the defrauded party, she has lost her rights by laches and cannot disturb the decree upon which others have relied.<sup>1</sup> Public policy forbids the review of decrees of divorce under such circumstances.<sup>2</sup> Actions to vacate decrees of divorce must be brought within a reasonable time after the discovery of the fraud. Such time must not exceed the period fixed by the statute of limitations within which actions must be brought after the discovery of fraud.<sup>3</sup> Every case must be governed by its own circumstances. The court is not governed by the statute in all cases, but may apply the inherent principles peculiar to courts of equity and refuse all relief for a delay of a shorter period than is permitted by the statute.<sup>4</sup> The cause of action accrues when the party discovers that a decree of divorce was rendered. The fact that the decree was entered of record and was therefore constructive notice of the proceeding will not be such actual notice as will put the plaintiff upon inquiry.<sup>5</sup>

What will explain and excuse delay cannot be stated in advance by any rule of law, but is to be determined by the circumstances of each case.<sup>6</sup> In one instance a decree was

<sup>1</sup> *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223; *Yorston v. Yorston*, 32 N. J. Eq. 495.

<sup>2</sup> *Thompson v. Thompson*, 91 Ala. 591.

<sup>3</sup> *Larimore v. Knoyle*, 43 Kan. 338, 23 P. 487; *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342; *Sloan v. Sloan*, 102 Ill. 581; *Jones v. Jones*, 78 Wis. 446, 47 N. W. 728; *Bourlon v. Waggaman*, 28 La. An. 481; *Holbrook v. Holbrook*, 114 Mass. 568; *Prewit v. Dyer* (Cal.), 40 P. 105.

<sup>4</sup> *Sedlack v. Sedlack*, 14 Or. 540, 13 P. 452; *Cochran v. Cochran* (Neb.), 60 N. W. 932.

<sup>5</sup> *Brown v. Grove*, 116 Ind. 84, 18 N. E. 387; *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342.

<sup>6</sup> *Linn v. Linn*, 2 N. Y. Supp. 578; *Perry v. Perry*, 15 Phila. 242; *Potts v. Potts*, 10 W. N. C. 102; *Firmin v. Firmin*, 16 Phil. 75; *Smith v. Smith*, 3 Phila. 489; *Kellow v. Kellow*, 1 Le Val. Rep. 202.

vacated after the death of the husband, and although twenty years had elapsed since the date of the decree, where the husband had obtained a decree in his wife's name and concealed the proceedings from her.<sup>1</sup> If the plaintiff had some notice of the proceedings, a delay of fifteen years is not excused by plaintiff's poverty and her desire to wait until her son attains majority.<sup>2</sup> Poverty will excuse a delay of nearly two years.<sup>3</sup> Where plaintiff has resided in the community for eight or nine years and had some knowledge of the fraud, her unexplained delay is too great.<sup>4</sup> A decree was vacated fourteen years after it was rendered, where the wife brought an action to vacate within seven months after discovering that such decree had been rendered, the delay of seven months being excused by her poverty.<sup>5</sup> A wife is not entitled to this relief where she has delayed her suit for four years while relying upon her husband's promise of a suitable provision for her; the inference being that she did not regard the wrong perpetrated upon her by the defendant in obtaining the divorce, but brings the action for alimony alone.<sup>6</sup>

The doctrine of estoppel may be applied in these cases, although it is shown that the decree was obtained by fraud. A party may be estopped from showing that a decree is void

<sup>1</sup> *Brown v. Grove*, 116 Ind. 84, 18 N. E. 387.

<sup>2</sup> *Earle v. Earle*, 91 Ind. 27.

<sup>3</sup> *Everett v. Everett*, 60 Wis. 200.

<sup>4</sup> *Zoellner v. Zoellner*, 46 Mich. 511.

<sup>5</sup> *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342.

<sup>6</sup> *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223.

A wife testified that she returned to the place where the divorced husband resided for the purpose of effecting a reconciliation, but her relatives who resided in the same place dissuaded her

from such course. It appeared that the fact of their divorce was known to the relatives and was a matter of common knowledge in the community, although the divorce was obtained in another county. Five years after her return the wife applied to have the decree set aside. Held, that her knowledge of the decree would be presumed from the date of her return; and the action was dismissed because not brought within three years (statutory period) after discovery of the fraud. *Prewitt v. Dwyer* (Cal.), 40 P. 105.

by his conduct showing a reliance upon the decree. Thus, where a party has obtained a judgment or decree, he is estopped from showing in a subsequent proceeding that the court which granted him the relief had no jurisdiction. And where a party obtains a decree by fraud, it is clear that if the defrauded party relies upon the decree, or in any way accepts its benefits, he is estopped from asserting its invalidity. The doctrine is familiar and need not be repeated. The authorities have been cited elsewhere.<sup>1</sup>

**§ 1057. Procedure in vacating decree obtained by fraud.** The procedure in vacating a decree for fraud must conform to the local practice. Generally the application is by an original bill stating fully and particularly all the facts showing the fraud relied upon.<sup>2</sup> In some instances the application may be made by motion to vacate the decree under the provision of the code for vacating decrees after term.<sup>3</sup> But the decree may be vacated after the time fixed by the code.<sup>4</sup> The application must be made to the court which rendered the decree.<sup>5</sup> It should state when the fraud was discovered, and also any facts which explain or excuse any apparent delay.<sup>6</sup> The application should also show a meritorious defense to the suit, so that the court can determine that the fraud has prevented the party from obtaining justice and that a new trial will result in a different decree.<sup>7</sup> If possible

<sup>1</sup> See *Estoppel*, §§ 556 and 557.

of the case was that the trial court had no jurisdiction.

<sup>2</sup> *Johnson's Appeal*, 9 Pa. 416; *True v. True*, 6 Minn. 315. For forms of petitions held sufficient on demurrer, see *Lord v. Lord*, 66 Me. 265; *Rawlins v. Rawlins*, 18 Fla. 345. See, also, defective petition in *Larimore v. Knoyle*, 43 Kan. 338, 23 P. 487.

<sup>3</sup> *Mulkley v. Mulkley*, 100 Cal. 91, 34 P. 621.

<sup>4</sup> See *dictum* in *Smithson v. Smithson*, 37 Neb. 535, 56 N. W. 300. The only point determined in this opinion necessary to a determination

<sup>5</sup> *Smithson v. Smithson*, id.

<sup>6</sup> *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. 341; *Larimore v. Knoyle*, 43 Kan. 338, 23 P. 487; *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 228; *Redding v. Redding*, 15 N. Y. Supp. 60. See form of petition in *Daniels v. Benedict*, 50 Fed. 347.

<sup>7</sup> *Webster v. Webster*, 54 Ia. 153; *Everett v. Morrison*, 21 N. Y. Supp. 328; *Thelin v. Thelin*, 8 Ill. Ap. 421; *Long v. Long*, 59 Mich. 296; Com.

the plaintiff in the former suit should have actual notice of the application to vacate the decree.<sup>1</sup> But where the application is made in the same court that rendered the decree, the notice may be served upon the attorney who represented the plaintiff.<sup>2</sup> A third person who has relied upon the decree and married the plaintiff is a proper party to the proceeding and should have notice.<sup>3</sup> But this is seldom required. Such third person cannot escape from the liabilities of the second marriage by having the decree vacated for fraud, where he is not injured by the fraud.<sup>4</sup> If the plaintiff is dead, the legal representatives of the deceased should be made parties, and also all parties interested in the distribution of the estate.<sup>5</sup>

The evidence of fraud should be clear and convincing before the court will be justified in setting aside a decree.<sup>6</sup> If the application is made promptly and before third parties have relied upon the decree, the showing need not be as strong as where years have elapsed and the other party has married and died, leaving a widow and children.

The power of the court to vacate a decree on its own motion is limited to a reasonable time, not extending beyond the term in which the decree was rendered.<sup>7</sup> When the decree is vacated for fraud in deceiving the court as to the residence of the parties, the action must be dismissed if, at, the time of the application, neither of the parties is domiciled within the jurisdiction of the court. In such case the

v. Sperling, 8 Pa. Co. Ct. 491; Golden v. Golden (Ala.), 14 So. 638.

<sup>1</sup> But this is not always required.

Wanamaker v. Wanamaker, 10 Phila. 466; Keeseman v. Keeseman, 2 Pearson, 186; Fitch v. Fitch, 1 C. P. 46.

<sup>2</sup> Beach v. Beach, 6 Dak. 371, 43 N. W. 701; Yorke v. Yorke (N. Dak.), 55 N. W. 1095. But see, *contra*, Ellis v. Ellis, 13 Neb. 91.

<sup>3</sup> Carlisle v. Carlisle, 96 Mich. 128, 55 N. W. 673.

<sup>4</sup> Kinnier v. Kinnier, 45 N. Y. 535; Ruger v. Heckle, 21 Hun, 489, 85 N. Y. 483.

<sup>5</sup> Bomsta v. Johnson, 38 Minn. 230, 36 N. W. 341; Johnson v. Coleman, 23 Wis. 452; Rawlins v. Rawlins, 18 Fla. 345; Watson v. Watson, 47 How. Pr. 240.

<sup>6</sup> Hopkins v. Hopkins, 39 Wis. 167; Getcher v. Getcher, 51 Md. 187; Adams v. Adams, 51 N. H. 388.

<sup>7</sup> Brown v. Brown, 53 Wis. 29.

court never had jurisdiction of the parties and the subject-matter, and cannot obtain jurisdiction of the *status* of the parties by their appearance.<sup>1</sup> But if the court originally had jurisdiction by reason of the plaintiff's domicile in the state, the decree is set aside, the defendant permitted to answer, and the case is tried upon its merits.<sup>2</sup> In this proceeding temporary alimony may be allowed the wife.<sup>3</sup> The order denying the application to vacate a decree is a final order and may be reviewed.<sup>4</sup>

<sup>1</sup> Crouch *v.* Crouch, 30 Wis. 667; Stephens *v.* Stephens, 62 Tex. 337; Lord *v.* Lord, 66 Me. 265; Smith *v.* McMurray, 78 Tex. Smith, 4 Greene (Ia.), 266.

<sup>2</sup> Edson *v.* Edson, 108 Mass. 590; Adams *v.* Adams, 51 N. H. 388; Yorke *v.* Yorke (N. D.), 55 N. W. 1095; Whitcomb *v.* Whitcomb, 46 Ia. 437; Rush *v.* Rush, 46 Ia. 648;

<sup>3</sup> Ex parte Smith, 34 Ala. 455;

Everett *v.* Everett, 60 Wis. 200.

<sup>4</sup> Haverty *v.* Haverty, 35 Kan. 438, 11 P. 364.



## DIVORCE STATUTES.

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The following statutes were in force on the 1st day of January, 1895, unless otherwise noted. The codes and revised statutes from which the language is quoted are given in connection with each state, and any subsequent legislation is cited from the session laws of later date. The session laws of each were examined as late as the year 1895. For convenience the causes for divorce are given separately for each state in their alphabetical order, followed by the statutory provisions relating to the residence of the parties.<sup>1</sup> Statutes relating to constructive service on defendant are important in determining the validity of decrees of divorce rendered in other states, and are inserted separately.<sup>2</sup>

The Code of California relating to marriage and divorce is inserted in full on account of its importance in other states, and because it is the most complete code on this subject.<sup>3</sup> The English Divorce Act of 1857 is also included, as it is not accessible to many, and is important in a work requiring the examination of English decisions.

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## CAUSES FOR DIVORCE.

### ALABAMA.

(Code 1886, sec. 2322.)

#### ABSOLUTE DIVORCE.

(1) In favor of either party, where the other was, at the time of the marriage, physically and incurably incapacitated from entering into the marriage state.

(2) Adultery.

<sup>1</sup> Page 1053.

<sup>2</sup> Page 1068.

<sup>3</sup> Page 1076.

(3) Voluntary abandonment from bed and board for two years next preceding the filing of the bill.

(4) Imprisonment in the penitentiary of this or any other state for two years, the sentence being for seven years or longer.

(5) The commission of the crime against nature, whether with mankind or beast, either before or after marriage.

(6) Becoming addicted after marriage to habitual drunkenness.

(7) In favor of the husband when the wife was pregnant at the time of marriage without his knowledge or agency.

(8) In favor of the wife when the husband has committed actual violence on her person, attended with danger to life or health; or when from his conduct there is reasonable apprehension of such violence.

#### LIMITED DIVORCE.

(1) Cruelty in either of the parties, or any cause which would justify a decree from the bonds of matrimony, if the party applying therefor desires only a divorce from bed and board.

#### ARIZONA.

(Sec. 2110, Revised Statutes 1887.)

#### ABSOLUTE DIVORCE.

(1) When the husband or wife is guilty of excesses, cruel treatment, or outrages towards the other, whether by the use of personal violence or any other means.

(2) In favor of the husband when his wife shall have been taken in adultery; or where she shall have voluntarily left his bed and board for the space of six months with the intention of abandonment.

(3) In favor of the wife where the husband shall have left her for six months with the intention of abandonment; or,

For habitual intemperance; or,

Wilful neglect to provide for his wife the necessaries or comforts of life for like period, having the ability to provide the same, or failing to do so by reason of his idleness, profligacy or dissipation; or,

Where he shall have been taken in adultery with another woman.

(4) In favor of either husband or wife, when the other shall have been convicted, after marriage, of a felony, and imprisoned in any prison.

There is no limited divorce in Arizona.

#### ARKANSAS.

(Sec. 2556, Mansfield's Digest 1887.)

#### ABSOLUTE OR LIMITED DIVORCE.

(1) Where either party, at the time of the contract, was, and still is, impotent.

(2) Where either party wilfully deserts and absents himself or herself from the other for the space of one year without reasonable cause.

(3) Where he or she had a former wife or husband living at the time of the marriage sought to be set aside.

(4) Where either party shall be convicted of felony or other infamous crime.

(5) Where either party shall be addicted to habitual drunkenness for the space of one year; or (a) shall be guilty of such cruel and barbarous treatment as to endanger the life of the other; or (b) shall offer such indignities to the person of the other as shall render his or her condition intolerable.

(6) Where either party shall have committed adultery subsequent to such marriage.

(7) Where either party shall, subsequent to such marriage, have become permanently or incurably insane.

#### CALIFORNIA.

See California Code, page 1076.

#### COLORADO.

(Act of 1893.)

#### ABSOLUTE DIVORCE.

(1) When either party, at the time of marriage, was, and continued to be, impotent; or, in consequence of immoral or criminal conduct subsequent to the marriage, became impotent.

(2) When he or she had a wife or husband living at the time of such marriage.

(3) When either party has committed adultery subsequent to the marriage; or,

(4) Has wilfully deserted and absented himself or herself from the husband or wife, without reasonable cause, for the space of one year.

(5) Has been guilty of extreme or repeated acts of cruelty, inflicting mental suffering or bodily violence.

(6) That the husband, being in good bodily health, shall fail to make reasonable provision for the support of his family for the space of one year.

(7) That either party has been guilty of habitual drunkenness for the space of one year.

(8) That either party has been convicted of felony.

There is no limited divorce, but alimony may be granted without divorce.

**CONNECTICUT.**

(Sec. 2802, General Statutes.)

**ABSOLUTE DIVORCE**

- (1) Adultery.
- (2) Fraudulent contract.
- (3) Wilful desertion for three years, with total neglect of duty.
- (4) Seven years' absence, during all which period the absent party has not been heard from.
- (5) Habitual intemperance.
- (6) Intolerable cruelty.
- (7) Sentence to imprisonment for life.
- (8) Any infamous crime involving a violation of conjugal duty and punishable by imprisonment in the state prison.

There is no limited divorce in Connecticut.

**DAKOTA.**

See North Dakota and South Dakota. See, also, California Code, sec. 92.

**DELAWARE.**

(Revised Code 1893.)

**ABSOLUTE DIVORCE**

- (1) Adultery.
- (2) Desertion for three years.
- (3) Habitual drunkenness.
- (4) Impotency of either party at the time of marriage.
- (5) Extreme cruelty.
- (6) Conviction, either in or out of this state, after marriage, of a crime by the laws of this state deemed felony, whether such crime shall be perpetrated before or after such marriage.
- (7) Procurement of marriage by fraud for want of age, the husband being under the age of eighteen years, or the wife being under the age of sixteen years, at the time of the marriage, and such marriage not being, after those ages, voluntarily ratified.
- (8) Wilful neglect on the part of the husband for three years to provide for his wife the necessaries of life suitable to her condition.

**LIMITED DIVORCE.**

Either an absolute or limited divorce may be decreed, at the discretion of the court, for the seventh and eighth causes above specified.

## DISTRICT OF COLUMBIA.

(U. S. Statutes at Large 1873-74.)

## ABSOLUTE DIVORCE.

(1) When such marriage was contracted while either of the parties thereto had a former wife or husband living, unless the former marriage had been lawfully dissolved and no restraint imposed on the party contracting such second marriage.

(2) Where such marriage was contracted during the lunacy of either party.

(3) Where either party was matrimonially incapacitated at the time of marriage.

(4) Where either party has committed adultery during the marriage.

(5) For habitual drunkenness for a period of three years of either party complained against.

(6) For cruelty of treatment, endangering the life or health of the party complaining.

(7) For wilful desertion and abandonment by the party complained of against the party complaining for the full uninterrupted space of two years.

## LIMITED DIVORCE.

(1) Cruelty of treatment, endangering the life or health of one of the parties.

(2) Reasonable apprehension, to the satisfaction of the court, of bodily harm.

## FLORIDA.

(Revised Statutes 1891, sec. 1480.)

## ABSOLUTE DIVORCE.

(1) Where the parties are within the degrees of relationship prohibited by law.

(2) Where either party is naturally impotent.

(3) Adultery in either of the parties.

(4) Extreme cruelty in either party.

(5) Habitual indulgence by defendant in violent and ungovernable temper.

(6) Habitual intemperance of defendant.

(7) Wilful, obstinate and continued desertion by either party for the term of one year.

(8) That defendant has obtained a divorce in any other state or country.

(9) That either party had a husband or wife living at the time of the marriage sought to be annulled.

There is no limited divorce in Florida, but the wife may obtain alimony without divorce for the following causes: (1) On the husband's deserting his wife for one year; (2) on his living in open and avowed adultery with another woman for three months; (3) in cases of cruel, inhuman and barbarous treatment; (4) on the husband's committing any act which shall be cause of divorce under the statutes of this state.

### GEORGIA.

(Code 1882, secs. 1712, 1714.)

#### ABSOLUTE DIVORCE.

(1) Intermarriage by persons within the prohibited degrees of consanguinity and affinity.

(2) Mental incapacity at the time of marriage.

(3) Impotency at the time of the marriage.

(4) Force, menaces, duress or fraud in obtaining the marriage.

(5) Pregnancy of the wife at the time of the marriage unknown to the husband.

(6) Adultery in either of the parties after marriage.

(7) Wilful and continued desertion by either of the parties for the term of three years.

(8) The conviction of either party of an offense involving moral turpitude, and under which he or she is sentenced to imprisonment in the penitentiary for the term of two years or longer.

Absolute or limited divorce may be granted in the discretion of the jury in case of either (1) cruel treatment or (2) habitual intoxication by either party.

#### LIMITED DIVORCE.

(1) "Divorces from bed and board may be granted on any ground which was held sufficient in the English courts prior to May 4, 1784."

### IDAHO.

See California Code, secs. 82, 83, 92, 128, 141.

### ILLINOIS.

(S. & C. Annotated Statutes 1885, ch. 40.)

#### ABSOLUTE DIVORCE.

(1) When either party at the time of marriage was, and continues to be, naturally impotent.

(2) When he or she had a wife or husband living at the time of such marriage.

- (3) When either party has committed adultery subsequently to the marriage; or,
- (4) Has wilfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of two years; or,
- (5) Has been guilty of habitual drunkenness for the space of two years; or,
- (6) Has attempted the life of the other by poison or other means showing malice; or,
- (7) Has been guilty of extreme and repeated cruelty; or,
- (8) Has been convicted of felony or other infamous crime.

There is no limited divorce in Illinois, but the wife may obtain alimony without divorce, where she is living apart from her husband without her fault.

#### INDIANA.

(Annotated Code 1888, sec. 1032.)

##### ABSOLUTE DIVORCE.

- (1) Adultery.
- (2) Impotency existing at the time of the marriage.
- (3) Abandonment for two years.
- (4) Cruel and inhuman treatment of either party by the other.
- (5) Habitual drunkenness of either party.
- (6) The failure of the husband to make reasonable provision for his family for a period of two years.
- (7) The conviction, subsequent to the marriage, in any country, of either party, of an infamous crime.

There is no limited divorce in Indiana, but a married woman may obtain provision for the support of herself and infant children in the following cases (sec. 5132):

- (1) When the husband shall have deserted his wife, or wife and children, not leaving her or them sufficient provision for her or their support.
- (2) When the husband shall have been convicted of felony, and imprisoned in the state prison, not leaving his wife, or his wife and children, sufficient provision for her or their support.
- (3) When the husband is an habitual drunkard, and by reason thereof becomes incapacitated or neglects to provide for his family.
- (4) When a married man renounces the marriage covenant or refuses to live with his wife in the conjugal relation, by joining himself to a sect or denomination the rules and doctrines of which require a renunciation of the marriage covenant, or forbid a man and woman to dwell and cohabit together in the conjugal relation according to the true intent and meaning of the institution of marriage.

## INDIAN TERRITORY.

Statute the same as Arkansas, page 1026.

## IOWA.

(McClain's Annotated Code 1888, sec. 3414.)

## ABSOLUTE DIVORCE.

- (1) Against the husband when he has committed adultery subsequent to the marriage.
- (2) When he wilfully deserts his wife and absents himself without a reasonable cause for the space of two years.
- (3) When he is convicted of felony after the marriage.
- (4) When, after marriage, he becomes addicted to habitual drunkenness.
- (5) When he is guilty of such inhuman treatment as to endanger the life of his wife.
- (6) Against the wife for the causes above specified, and also when the wife at the time of the marriage was pregnant by another than her husband, unless the husband have an illegitimate child or children then living, which was unknown to the wife at the time of their marriage.

There is no limited divorce in Iowa, but courts of equity will grant alimony without divorce.

## KANSAS.

(General Statutes 1889, sec. 4749.)

## ABSOLUTE DIVORCE.

- (1) When either of the parties had a former husband or wife living at the time of the subsequent marriage.
- (2) Abandonment for one year.
- (3) Adultery.
- (4) Impotency.
- (5) When the wife, at the time of the marriage, was pregnant by another than her husband.
- (6) Extreme cruelty.
- (7) Fraudulent contract.
- (8) Habitual drunkenness.
- (9) Gross neglect of duty.
- (10) The conviction of felony and imprisonment in the penitentiary therefor subsequent to the marriage.

There is no limited divorce in Kansas, but the wife, whether a resident or non-resident, may obtain alimony without divorce from her husband, in an action brought for that purpose, for any of the causes for which a divorce may be granted.

**KENTUCKY.**

(General Statutes 1888.)

**ABSOLUTE DIVORCE.**

To both husband and wife for the following causes:

- (1) Such impotency or malformation as prevents sexual intercourse.
- (2) Living apart without any cohabitation for five consecutive years next before the application.

Also to the party not in fault for the following causes:

- (1) Abandonment of one party by the other for one year.
- (2) Living in adultery with another man or woman.
- (3) Condemnation for felony, in or out of this state.
- (4) Concealment from the other party of any loathsome disease existing at the time of marriage; or,
- (5) Contracting such afterwards.
- (6) Force, duress, or fraud in obtaining the marriage.
- (7) Uniting with any religious society whose creed and rules require a renunciation of the marriage covenant, or forbid husband and wife from cohabiting.

Also to the wife, when not in like fault, for the following causes:

- (1) Confirmed habit of drunkenness on the part of the husband of not less than one year's duration, accompanied with a wasting of his estate, and without any suitable provision for the maintenance of his wife or children.

- (2) Habitually behaving towards her by the husband, for not less than six months, in such cruel and inhuman manner as to indicate a settled aversion to her, or to destroy permanently her peace or happiness.

- (3) Such cruel beating or injury, or attempt at injury, of the wife by the husband as indicates an outrageous temper in him, or probable danger to her life, or great bodily injury, from her remaining with him.

Also to the husband for the following causes:

- (1) Where the wife is pregnant by another man without the husband's knowledge at the time of marriage.
- (2) When not in like fault, for habitual drunkenness on the part of the wife of not less than one year's duration.
- (3) Adultery by the wife, or such lewd, lascivious behavior on her part as proves her to be unchaste, without actual proof of an act of adultery.

**LIMITED DIVORCE.**

Judgment for separation, or divorce from bed and board, may also be rendered for any of the causes which allow divorce, or for such other cause as the court in its discretion may deem sufficient.

**LOUISIANA.****ABSOLUTE DIVORCE.**

- (1) Where the husband or wife may have been sentenced to an infamous punishment; or,
- (2) Guilty of adultery.

**LIMITED DIVORCE.**

- (1) In case of adultery on the part of the other spouse.
- (2) Where the other spouse has been condemned to an infamous punishment.
- (3) On account of the habitual intemperance of one of the married persons; or,
- (4) Excesses, cruel treatment, or outrages of one of them toward the other, if such ill-treatment is of such a nature as to render their living together insupportable.
- (5) Public defamation on the part of one of the married persons towards the other.
- (6) The abandonment of the husband by the wife, or the wife by her husband.
- (7) An attempt of one of the married persons against the life of the other.
- (8) Where the husband or wife has been charged with an infamous offense and shall actually have fled from justice, on producing proofs that such husband or wife has actually been guilty of such infamous offense, and has fled from justice.

The party obtaining a limited divorce may, after one year, obtain an absolute divorce.

**MAINE.**

(Revised Statutes 1883.)

**ABSOLUTE DIVORCE.**

- (1) Adultery.
- (2) Impotence.
- (3) Extreme cruelty.
- (4) Utter desertion, continued for three consecutive years next prior to the filing of the libel.
- (5) Gross and confirmed habits of intoxication.
- (6) Cruel and abusive treatment.
- (7) On the libel of the wife, when the husband, being of sufficient ability, or being able to labor and provide for her, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her.  
(Act of 1893.)

No limited divorce or decree *nisi* is granted. (Act of 1889.)

**MARYLAND.**

(General Statutes, page 142.)

**ABSOLUTE DIVORCE.**

- (1) The impotence of either party at the time of the marriage.
- (2) Any cause which, by the laws of this state, renders a marriage null and void *ab initio*.
- (3) Adultery.
- (4) When the court shall be satisfied by competent testimony that the party complained against has abandoned the party complaining, and that such abandonment has continued uninterruptedly for at least three years, and is deliberate and final, and the separation of the parties beyond any reasonable expectation of reconciliation.
- (5) When the woman before marriage has been guilty of illicit carnal intercourse with another man, the same being unknown to the husband at the time of the marriage, and when such carnal connection shall be proved to the satisfaction of the court.

**LIMITED DIVORCE.**

- (1) Cruelty of treatment.
  - (2) Excessively vicious conduct.
  - (3) Abandonment and desertion.
- Limited divorce may be decreed in a case where absolute divorce is prayed, if the causes proved be sufficient to entitle the party to the same.

**MASSACHUSETTS.**

(Public Statutes 1882.)

**ABSOLUTE DIVORCE.**

- (1) Adultery.
- (2) Impotency.
- (3) Extreme cruelty.
- (4) Utter desertion continued for three consecutive years next prior to the filing of the libel.
- (5) Gross and confirmed habits of intoxication.
- (6) Cruel and abusive treatment.
- (7) On the libel of the wife, when the husband, being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her.
- (8) When either party has separated from the other without his or her consent, and has united with a religious sect or society that professes to believe the relation of husband and wife void or unlawful, and has continued united with such sect or society for three years, refusing during that term to cohabit with the other party.

(9) When either party has been sentenced to confinement at hard labor for life or for five years or more in the state prison, or in a jail or house of correction.

#### LIMITED DIVORCE.

Excessive use of opium or other drugs. (Act of 1889.)

A divorce from the bond of matrimony may be decreed for any of the causes allowed by law, notwithstanding the fact that the libelee has been continuously absent for such a period of time and under such circumstances as would raise a presumption of death.

All decrees of divorce shall in the first instance be decrees *nisi*, to become absolute after the expiration of six months from the entry thereof, and thereupon the clerk shall enter a final decree unless the court has, for sufficient cause, on application of any party interested, otherwise ordered. (Act of 1893.)

It is now provided by statute that when a divorce from bed and board, under laws heretofore in force, has been decreed, and the parties have lived separately for three consecutive years next after the decree, a divorce from the bonds of matrimony may be granted upon the petition of the party in whose favor the previous decree was granted; and when the parties have lived separately for five consecutive years next after such decree, a divorce from the bond of matrimony may be decreed in favor of either party.

#### MICHIGAN.

(Howell's Annotated Statutes 1882, sec. 6228.)

#### ABSOLUTE DIVORCE.

(1) Whenever adultery has been committed by any husband or wife.

(2) When one of the parties was physically incompetent at the time of the marriage.

(3) When one of the parties has been sentenced to imprisonment in any prison, jail or house of correction for three years or more; and no pardon granted to the party so sentenced, after a divorce for that cause, shall restore such party to his or her conjugal rights.

(4) When either party shall desert the other for the term of two years.

(5) When the husband or wife shall have become an habitual drunkard.

(6) And the circuit courts may, in their discretion, upon application as in other cases, divorce from the bonds of matrimony any party who is a resident of this state, and whose husband or wife shall have obtained a divorce in any other state.

#### LIMITED DIVORCE (or absolute in the discretion of the court).

(1) Extreme cruelty, whether practiced by using personal violence or by other means.

- (2) Utter desertion by either of the parties for the term of two years.
- (3) On complaint of the wife, when the husband, being of sufficient ability to provide a suitable maintenance for her, shall grossly or wantonly and cruelly refuse or neglect so to do.

### **MINNESOTA.**

(General Statutes 1889.)

#### **ABSOLUTE DIVORCE.**

- (1) Adultery.
- (2) Impotency.
- (3) Cruel and inhuman treatment.
- (4) When either party, subsequent to the marriage, has been sentenced to imprisonment in the state prison.
- (5) Wilful desertion of one party by the other for the term of three years next preceding the filing of the complaint.
- (6) Habitual drunkenness for the space of one year immediately preceding the filing of the complaint.

#### **LIMITED DIVORCE (to wife only, forever or for limited time.)**

- (1) Cruel and inhuman treatment by the husband of his wife.
- (2) Such conduct on the part of the husband towards his wife as may render it unsafe and improper for her to cohabit with him.
- (3) The abandonment of the wife by the husband, and his refusal or neglect to provide for her.

### **MISSISSIPPI.**

(Annotated Code 1892, sec. 1562.)

#### **ABSOLUTE DIVORCE.**

- (1) Natural impotency.
- (2) Adultery, unless it shall appear that it was committed by collusion of the parties for the purpose of procuring a divorce, or unless the parties cohabited after a knowledge by complainant of the adultery.
- (3) Being sentenced to the penitentiary, and not pardoned before being sent there.
- (4) Wilful, continued and obstinate desertion for the space of two years.
- (5) Habitual drunkenness.
- (6) Habitual and excessive use of opium, morphine or other like drug.
- (7) Habitual cruel and inhuman treatment.
- (8) Insanity or idiocy at the time of marriage, if the party complaining did not know of such infirmity.
- (9) Marriage to some other person at the time of the pretended marriage between the parties.

(10) Pregnancy of the wife by another person at the time of the marriage, if the husband did not know of such pregnancy.

(11) Either party may have a divorce if they be related to each other within the degrees of kindred between whom marriage is prohibited by law.

#### LIMITED DIVORCE.

Limited divorce is not granted, but courts of equity may grant a separate maintenance.

#### MISSOURI.

(Revised Statutes 1889, sec. 4500.)

#### ABSOLUTE DIVORCE.

(1) When either party, at the time of the contract of marriage, was and still is impotent; or,

(2) Had a wife or husband living at the time of the marriage; or,

(3) Has committed adultery since the marriage; or,

(4) Has absented himself or herself, without a reasonable cause, for the space of one year; or,

(5) During said marriage shall have been convicted of felony or infamous crime; or,

(6) Shall have been addicted to habitual drunkenness for the space of one year; or,

(7) Shall be guilty of such cruel or barbarous treatment as to endanger the life of the other; or,

(8) Shall offer such indignities to the other as shall render his or her condition intolerable; or,

(9) When the husband shall be guilty of such conduct as to constitute him a vagrant, within the meaning of the law respecting vagrants; or,

(10) Where, prior to the contract of marriage, or the solemnization thereof, either party shall have been convicted of a felony, or infamous crime, in any state, territory or country, without knowledge on the part of the other party of such fact at the time of such marriage; or,

(11) Where the intended wife, at the time of marriage, shall have been pregnant by any other man than her intended husband, and without his knowledge at the time of such solemnization.

There is no limited divorce in Missouri.

#### MONTANA.

(Compiled Statutes 1887, sec. 999.)

#### ABSOLUTE DIVORCE.

(1) If either party was, at the time of marriage, and continued to be, impotent naturally; or,

- (2) That he or she had a wife or husband living at the time of marriage; or,
- (3) That either party has committed adultery subsequent to marriage; or,
- (4) Has wilfully absented himself or herself from the other without reasonable cause for the space of one year; or,
- (5) In favor of the wife if the husband has wilfully deserted and absented himself from his wife, and departed from the territory without intention of returning; or,
- (6) If either party has been guilty of habitual drunkenness for the space of one year; or,
- (7) Has been guilty of extreme cruelty; or,
- (8) Has been convicted of felony or other infamous crime.

There is no limited divorce in Montana.

#### NEBRASKA.

(Consolidated 1893.)

##### ABSOLUTE DIVORCE.

- (1) When adultery has been committed by any husband or wife.
- (2) When one of the parties was physically incompetent at the time of the marriage.
- (3) When one of the parties has been sentenced to imprisonment in any prison, jail or house of correction for three years or more; and no pardon granted after a divorce for this cause shall restore such party to his or her conjugal rights.
- (4) When either party shall wilfully abandon the other without just cause for the term of two years.
- (5) When the husband or wife shall have become an habitual drunkard.
- (6) When either party shall be sentenced to imprisonment for life, and no pardon shall effect a decree for that cause rendered.
- (7) Extreme cruelty, whether practiced by using personal violence or by other means.
- (8) Utter desertion of either party for the term of two years.
- (9) In favor of the wife, when the husband, being of sufficient ability to provide suitable maintenance for her, shall grossly or wantonly and cruelly refuse or neglect so to do.

##### LIMITED DIVORCE.

For the last three causes limited divorce may also be decreed.

#### NEVADA.

(General Statutes 1885.)

##### ABSOLUTE DIVORCE.

- (1) Impotency at the time of the marriage, continuing to the time of the divorce.

- (2) Adultery since the marriage remaining unforgiven.
- (3) Wilful desertion at any time of either party by the other for the period of one year.
- (4) Conviction of felony or infamous crime.
- (5) Habitual gross drunkenness, contracted since marriage, of either party, which shall incapacitate such party from contributing his or her share to the support of the family.
- (6) Extreme cruelty in either party.
- (7) Neglect of the husband for one year to provide the common necessities of life, when such neglect is not the result of poverty on the part of the husband, which he could not avoid by ordinary industry.

There is no limited divorce in Nevada.

#### NEW HAMPSHIRE.

(General Laws 1878.)

#### ABSOLUTE DIVORCE.

- (1) Impotency of either party.
- (2) Adultery of either party.
- (3) Extreme cruelty of either party to the other.
- (4) Conviction of either party of crime punishable in this state with imprisonment for more than one year, and actual imprisonment under such conviction.
- (5) When either party has so treated the other as seriously to injure health.
- (6) When either party has so treated the other as seriously to endanger reason.
- (7) When either party has been absent three years together and has not been heard of.
- (8) When either party is an habitual drunkard, and has been such for three years together.
- (9) When either party has joined any religious sect or society which professes to believe the relation of husband and wife unlawful, and refused to cohabit with the other for six months together.
- (10) When either party, without sufficient cause and without the consent of the other, has abandoned and refused for three years together to cohabit with the other.
- (11) When the husband has willingly absented himself from the wife for three years together without making suitable provision for her support and maintenance.
- (12) When the wife of any citizen has willingly absented herself from her husband without his consent for three years together.
- (13) When the wife of any citizen has gone to reside beyond the limits of this state, and remained absent and separate from her husband ten

years together without his consent and without returning to claim her marriage rights.

(14) When the wife of any alien or citizen of another state living separate has resided in this state for three years together, her husband having left the United States with the intention of becoming a citizen of some foreign country, and not having during that period come into this state and claimed his marital rights, and not having made suitable provision for his wife's support and maintenance.

There is no limited divorce in New Hampshire.

#### NEW JERSEY.

(Revision 1886.)

##### ABSOLUTE DIVORCE.

- (1) Where the parties are within the degrees prohibited by law; and
- (2) In case of adultery in either of the parties; and, also,
- (3) For wilful, continued and obstinate desertion for the term of two years. (Amended March 5, 1890; April 1, 1887.)

##### LIMITED DIVORCE.

- (1) For extreme cruelty in either of the parties.

A divorce from bed and board forever may be granted for—

- (1) Desertion.
- (2) Adultery; and if the applicant has conscientious scruples against absolute divorce, the court may at its discretion deprive the guilty party of dower, etc. (Act of 1891.)

In case a husband shall abandon his wife and refuse or neglect to maintain and provide for her, the court may decree support and maintenance to the wife and the children of the marriage.

#### NEW MEXICO.

(Act of 1887.)

##### ABSOLUTE DIVORCE.

- (1) Adultery.
- (2) Cruel or inhuman treatment.
- (3) Abandonment.
- (4) Habitual drunkenness.
- (5) Neglect on the part of the husband to support the wife.

There is no limited divorce in New Mexico.

#### NEW YORK.

(Annotated Code 1888, secs. 1756, 1762.)

##### ABSOLUTE DIVORCE.

- (1) Adultery of either party.

**LIMITED DIVORCE.**

- (1) The cruel and inhuman treatment of the plaintiff by the defendant.
- (2) Such conduct on the part of the defendant toward the plaintiff as may render it unsafe and improper for the former to cohabit with the latter.
- (3) The abandonment of the plaintiff by the defendant.
- (3) When the wife is the plaintiff, the neglect or refusal of the defendant to provide for her.

**NORTH CAROLINA.**

(Code 1888, sec. 1285.)

**ABSOLUTE DIVORCE.**

- (1) If either party shall separate from the other and live in adultery.
- (2) If the wife shall commit adultery.
- (3) If either party at the time of marriage was, and still is, naturally impotent.
- (4) If the wife, at the time of the marriage, be pregnant, and the husband be ignorant of the fact of such pregnancy, and be not the father of the child with which the wife was pregnant at the time of the marriage.
- (5) If the husband shall be indicted for a felony and flee the state; and does not return within one year from the time the indictment is found. (Act of 1887.)
- (6) If, after the marriage, the wife shall wilfully and persistently refuse for twelve months to allow the husband to have sexual intercourse with her. (Act of 1889.)

**LIMITED DIVORCE.**

- (1) If either party shall abandon his or her family; or,
- (2) Shall maliciously turn the other out of doors; or,
- (3) Shall, by cruel or barbarous treatment, endanger the life of the other; or,
- (4) Shall offer such indignities to the person of the other as to render his or her condition intolerable and life burdensome; or,
- (5) Shall become an habitual drunkard.

The facts constituting the grounds for divorce must have existed for at least six months prior to the institution of the suit, except where the wife is the plaintiff, and the husband is removing, or about to remove, his property and effects from the state, whereby she may be disappointed in her alimony.

The statute permits the wife to recover alimony without divorce.

## NORTH DAKOTA.

See California Code, sec. 92. See, also, page 1076.

## OHIO.

(Compiled Statutes 1886, sec. 5689.)

## ABSOLUTE DIVORCE.

(1) That either party had a husband or wife living at the time of the marriage from which divorce is sought.

(2) Wilful absence of either party from the other for three years.

(3) Adultery.

(4) Impotency.

(5) Extreme cruelty.

(6) Fraudulent contract.

(7) Any gross neglect of duty.

(8) Habitual drunkenness for three years.

(9) The imprisonment of either party in a penitentiary under sentence thereto; but the petition for divorce under this clause shall be filed during the imprisonment of the adverse party.

(10) The procurement of a divorce without the state by a husband or wife, by virtue of which the party who procured it is released from the obligations of the marriage, while the same remain binding upon the other party.

There is no limited divorce in Ohio, but alimony without divorce may be granted the wife for any of the following causes:

(1) Adultery.

(2) Any gross neglect of duty.

(3) Abandonment of wife without good cause.

(4) That there is a separation in consequence of ill-treatment on the part of the husband, whether the wife is maintained by the husband or not.

(5) Habitual drunkenness.

(6) Sentence to and imprisonment in a penitentiary; in which case the application must be made while the husband is so confined.

## OKLAHOMA.

(Statutes 1893.)

## ABSOLUTE DIVORCE.

SEC. 664. The district court may grant a divorce for either of the following causes:

(1) When either of the parties had a prior husband or wife living at the time of the subsequent marriage.

(2) Abandonment for one year.

- (3) Adultery.
- (4) Impotency.
- (5) When the wife, at the time of the marriage, was pregnant by another than her husband.
- (6) Extreme cruelty.
- (7) Fraudulent contract.
- (8) Habitual drunkenness.
- (9) Gross neglect of duty.
- (10) The conviction of a felony, and imprisonment in the penitentiary therefor, subsequent to the marriage.

#### LIMITED DIVORCE.

No limited divorces are granted, but the wife may obtain alimony without divorce for any of the above causes for divorce in her favor.

#### OREGON.

(Hill, Annotated Laws, sec. 495.)

#### ABSOLUTE DIVORCE.

- (1) Impotency existing at the time of marriage and continuing to the commencement of the suit.
- (2) Adultery.
- (3) Conviction of felony.
- (4) Habitual gross drunkenness contracted since marriage and continuing for one year prior to the commencement of the suit.
- (5) Wilful desertion for the period of one year.
- (6) Cruel and inhuman treatment; or,
- (7) Personal indignities, rendering life burdensome.

There is no limited divorce in Oregon.

#### PENNSYLVANIA.

(Brightley's Purdon's Digest, 1888.)

#### ABSOLUTE DIVORCE.

- (1) When either party, at the time of the contract, was, and still is, naturally impotent or incapable of procreation; or,
- (2) That he or she hath knowingly entered into a second marriage in violation of the previous vow he or she made to the former husband or wife, whose marriage is still subsisting; or,
- (3) That either party shall have committed adultery; or,
- (4) Wilful and malicious desertion and absence from the habitation of the other, without a reasonable cause, for and during the term and space of two years; or,

(5) When any husband shall have, by cruel and barbarous treatment, endangered his wife's life; or,

(6) Offered such indignities to her person as to render her condition intolerable and life burdensome, and thereby force her to withdraw from his house and family.

(7) When the parties are within the degrees of consanguinity or affinity according to the table established by law.

(8) Where the alleged marriage was procured by fraud, force or coercion, and has not been subsequently confirmed by the acts of the injured party.

(9) Where either of the parties shall have been convicted of a felony, and sentenced by the proper court either to the county prison of the proper county, or to the penitentiary of the proper district, for any term exceeding two years.

(10) Where the wife shall have, by cruel and barbarous treatment, rendered the condition of her husband intolerable or life burdensome.

#### ABSOLUTE DIVORCE (to the wife).

(Act of 1898.)

(1) Adultery committed by the husband.

(2) Wilful and malicious desertion on the part of the husband, and absence from the habitation of the wife, without reasonable cause, for and during the term and space of two years.

(3) Where any husband, by cruel and barbarous treatment, endangered his wife's life, or offered such indignities to her person as to render her condition intolerable and life burdensome, and thereby force her to withdraw from his house and family.

(4) Where it shall be shown to the court, by any wife, that she was formerly a citizen of this commonwealth, and that, having intermarried with a citizen of any other state or any foreign country, she has been compelled to abandon the habitation and domicile of her husband in such other state or foreign country by reason of (the above causes, 1, 2 and 3), and has thereby been forced to return to this commonwealth in which she had her former domicile.

(The wife may file her petition for divorce on the ground of desertion, as described in section 2, any time after six months from the desertion; but no decree shall be rendered until two years from such desertion.)

#### LIMITED DIVORCE (to wife only).

(1) When any husband shall maliciously abandon his family; or,

(2) Turn his wife out of doors; or,

(3) By cruel and barbarous treatment endanger her life; or

(4) Offer such indignities to her person as to render her condition intolerable or life burdensome, and thereby force her to withdraw from his house and family.

(5) Adultery.

## RHODE ISLAND.

(Public Statutes 1882, ch. 167.)

## ABSOLUTE DIVORCE.

- (1) In case of any marriage originally void or voidable by law.
- (2) Where either party is for crime deemed to be, or treated as if, civilly dead.
- (3) Where either party, from absence or other circumstances, may be presumed to be naturally dead.
- (4) Impotency.
- (5) Adultery.
- (6) Extreme cruelty.
- (7) Wilful desertion for five years of either of the parties, or for such desertion for a shorter period of time, in the discretion of the court.
- (8) Continued drunkenness.
- (9) Neglect or refusal on the part of the husband, being of sufficient ability, to provide necessaries for the subsistence of his wife.
- (10) Any other gross misbehavior and wickedness in either of the parties repugnant to and in violation of the marriage covenant.
- (11) Whenever in the trial of any petition for divorce from the bond of marriage, or from bed and board and future cohabitation, it shall appear that the parties have lived separate and apart from each other for the space of at least ten years, the court, on motion of either party, may enter a decree divorcing both parties from the bond of marriage, and may make provision for alimony. (Act of 1893.)

## LIMITED DIVORCE.

Limited divorces, until the parties may be reconciled, may be granted for any of the causes for which, by law, a divorce from the bond of marriage may be decreed, and for such other causes as may seem to require the same.

## SOUTH DAKOTA.

See California Code, sec. 128. See, also, page 1076.

## TENNESSEE.

(Secs. 3306-3308, Code 1884.)

## ABSOLUTE DIVORCE.

- (1) That either party, at the time of the contract, was, and still is, naturally impotent and incapable of procreation.
- (2) That either party has knowingly entered into a second marriage, in violation of a previous marriage still subsisting.
- (3) That either party has committed adultery.

(4) Wilful or malicious desertion, or absence of either party without a reasonable cause for two whole years.

(5) Being convicted of any crime which, by the laws of the state, renders the party infamous.

(6) Being convicted of a crime which, by the laws of the state, is declared to be a felony, and sentenced to confinement in the penitentiary.

(7) When either party has attempted the life of the other, by poison, or any other means showing malice.

(8) Refusal on part of the wife to remove with her husband to this state without a reasonable cause, and wilfully absenting herself from him for two years.

(9) When the woman was pregnant at the time of the marriage by another person, without the knowledge of the husband.

(10) Habitual drunkenness of either party, when the husband or wife has contracted the habit of drunkenness after marriage.

#### LIMITED DIVORCE.

To wife only (or absolute divorce, at the discretion of the court):

(1) When the husband is guilty of cruel and inhuman treatment; or,

(2) Such conduct towards his wife as renders it unsafe and improper for her to cohabit with him and be under his dominion and control.

(3) When he has offered such indignities to her person as to render her condition intolerable and thereby forced her to withdraw.

(4) When he has abandoned her; or,

(5) Turned her out of doors and refused or neglected to provide for her.

#### TEXAS.

(Sayles' Civil Statutes, art. 2861.)

#### ABSOLUTE DIVORCE.

(1) When either the husband or wife is guilty of excesses, cruel treatment or outrages towards the other, if such ill-treatment is of such a nature as to render their living together insupportable.

(2) In favor of the husband where his wife shall have been taken in adultery; or,

(3) Where she shall have voluntarily left his bed and board for the space of three years with the intention of abandonment.

(4) In favor of the wife where the husband shall have left her for three years with the intention of abandonment; or,

(5) Where he shall have abandoned her, and lived in adultery with another woman.

(6) In favor of either husband or wife, when the other shall have been convicted, after marriage, of a felony and imprisoned in the state prison; provided, that no suit for divorce shall be sustained because of the conviction of either party for felony until twelve months after final

judgment of conviction, nor then if the governor shall have pardoned the convict; provided that the husband has not been convicted on the testimony of the wife, nor the wife on the testimony of the husband.

There is no limited divorce in Texas.

#### UTAH.

(Compiled Laws 1888, sec. 2602.)

##### ABSOLUTE DIVORCE.

- (1) Impotency of the defendant at the time of marriage.
- (2) Adultery committed by the defendant subsequent to marriage.
- (3) Wilful desertion of the plaintiff by the defendant for more than one year.
- (4) Wilful neglect of the defendant to provide for his wife the common necessaries of life.
- (5) Habitual drunkenness of the defendant.
- (6) Conviction of the defendant for felony.
- (7) Cruel treatment of the plaintiff by the defendant to the extent of causing great bodily injury or great mental distress to the plaintiff.

There is no limited divorce in Utah.

#### VERMONT.

(Revised Laws, sec. 2362.)

##### ABSOLUTE DIVORCE.

- (1) For adultery in either party.
- (2) When either party is sentenced to confinement to hard labor in the state prison for life, or for three or more years, and is actually confined at the time. And no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights.
- (3) For intolerable severity in either party.
- (4) For wilful desertion for three consecutive years.
- (5) When either party has been absent for seven years, and not heard of during that time.
- (6) On petition of the wife when the husband, being of sufficient pecuniary ability to provide suitable maintenance for her, without cause grossly or wantonly and cruelly refuses or neglects so to do.

There is no limited divorce in Vermont.

#### VIRGINIA.

(Code 1887, sec. 2257.)

##### ABSOLUTE DIVORCE.

- (1) Adultery.
- (2) Natural and incurable impotency of body existing at the time of entering into the matrimonial contract.

(3) Where either of the parties is sentenced to confinement in the penitentiary. And no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights.

(4) Where prior to the marriage either party, without the knowledge of the other, has been convicted of an infamous offense.

(5) Where either party charged with an offense punishable with death or confinement in the penitentiary has been indicted, is a fugitive from justice, and has been absent for two years.

(6) Where either party wilfully deserts or abandons the other for five years.

(7) To the husband where, at the time of the marriage, the wife, without the knowledge of the husband, was with child by some person other than the husband; or,

(8) Prior to such marriage, had been, without the knowledge of the husband, a prostitute.

#### LIMITED DIVORCE.

(1) Cruelty.

(2) Reasonable apprehension of bodily hurt.

(3) Abandonment or desertion. When a divorce from bed and board has been decreed for this cause and five years have elapsed since abandonment or desertion without reconciliation, the court may, on application of the injured party, decree a divorce from the bonds of matrimony.

#### WASHINGTON.

(Hill's Annotated Statutes 1891, sec. 764.)

#### ABSOLUTE DIVORCE.

(1) When the consent to the marriage of the party applying for the divorce was obtained by force or fraud, and there has been no subsequent voluntary cohabitation.

(2) For adultery on the part of the wife or of the husband, when unforgiven, and application is made within one year after it shall come to his or her knowledge.

(3) Impotency.

(4) Abandonment for one year.

(5) Cruel treatment of either party by the other; or,

(6) Personal iniquities rendering life burdensome.

(7) Habitual drunkenness of either party.

(8) Neglect or refusal of the husband to make suitable provisions for his family.

(9) The imprisonment of either party in the penitentiary, if complaint is filed during the term of such imprisonment.

(10) Any other cause deemed by the court sufficient, and when the court shall be satisfied that the parties can no longer live together.

(11) In case of incurable chronic mania or dementia of either party, having existed ten years or more, the court may, in its discretion, grant a divorce.

There is no limited divorce in Washington.

### WEST VIRGINIA.

(Code 1887, ch. 64.)

#### ABSOLUTE DIVORCE.

(1) Adultery.

(2) Natural or incurable impotency of body, existing at the time of entering into the matrimonial contract.

(3) Where either of the parties is sentenced to confinement in the penitentiary; and no pardon granted to the person so sentenced shall restore such party to his or her conjugal rights.

(4) Where, prior to marriage, either party, without the knowledge of the other, had been convicted of an infamous offense.

(5) Where either party wilfully abandons or deserts the other for three years.

(6) Where at the time of the marriage the wife, without the knowledge of the husband, was *enceinte* by some person other than the husband; or,

(7) Where the wife, prior to the marriage, had been, without the knowledge of the husband, notoriously a prostitute; or,

(8) Where the husband, prior to such marriage, had been, without the knowledge of the wife, notoriously a licentious person.

#### LIMITED DIVORCE.

(1) Cruel or inhuman treatment.

(2) Reasonable apprehension of bodily hurt.

(3) Abandonment.

(4) Desertion.

(5) Where either party after marriage becomes an habitual drunkard.

### WISCONSIN.

(Revised Statutes 1878, sec. 2356.)

#### ABSOLUTE DIVORCE.

S 2355. When either party shall be sentenced to imprisonment for life, the marriage shall be thereby absolutely dissolved, without any judgment of divorce or other legal process; and no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights. (See interpretation of this statute in sec. 366.)

(1) Adultery.

(2) Impotency.

(3) When either party subsequent to the marriage has been sentenced to imprisonment for three years or more; and no pardon granted after divorce for this cause shall restore the party sentenced to his or her conjugal rights.

(4) The wilful desertion of one party by the other for the term of one year next preceding the commencement of the action.

(5) When the treatment of either party by the other has been cruel and inhuman, whether practiced by using personal violence or by any other means; or,

(6) When the wife shall be guilty of like cruelty to her husband or be given to intoxication.

(7) Where the husband or wife shall have been an habitual drunkard for the space of one year immediately preceding the commencement of the action.

(8) Whenever the husband and wife shall have voluntarily lived entirely separate for the space of five years next preceding the commencement of the action, a divorce may be granted at the suit of either party.

**LIMITED DIVORCE (or absolute at discretion of the court).**

(1) For the fourth, fifth, sixth and seventh causes above specified.

(2) For extreme cruelty of either party.

(3) On the complaint of the wife, when the husband, being of sufficient ability, shall refuse or neglect to provide for her; or,

(4) When his conduct toward her is such as may render it unsafe and improper for her to live with him.

**WYOMING.**

(Revised Statutes 1887, sec. 1571.)

**ABSOLUTE DIVORCE.**

(1) When adultery has been committed by any husband or wife.

(2) When one of the parties was physically incompetent at the time of the marriage, and the same has continued to the time of the divorce.

(3) When one of the parties has been convicted of a felony and sentenced to imprisonment therefor in any prison, and no pardon granted after divorce for this cause shall restore the party sentenced to his or her conjugal rights.

(4) When either party has wilfully deserted the other for the term of one year.

(5) When the husband or wife shall have become an habitual drunkard.

(6) When one of the parties has been guilty of extreme cruelty to the other.

(7) When the husband for the period of one year has neglected to provide the common necessities of life, when such neglect is not the result of poverty on the part of the husband, which he could not avoid by ordinary industry.

(8) When either party shall offer such indignities to the other as shall render his or her condition intolerable.

(9) When the husband shall be guilty of such conduct as to constitute him a vagrant within the meaning of the law respecting vagrancy.

(10) When, prior to the marriage, either party shall have been convicted of a felony or infamous crime in any state, territory or count[r]y without knowledge on the part of the other party of such fact at the time of such marriage.

(11) When the intended wife at the time of contracting marriage, or at the time of the solemnization thereof, shall have been pregnant by any other man than her intended husband, and without his knowledge at the time of such solemnization.

There is no limited divorce in Wyoming.

## DOMICILE OF PARTIES.

## ALABAMA.

(Civil Code 1886.)

§ 2328. No bill can be filed for a divorce on the ground of voluntary abandonment, unless the party applying therefor, whether husband or wife, has *bona fide* been a resident of the state for three years next before the filing of the bill, which must be alleged in the bill and proved.

§ 2329. Bills for divorce may be filed in the chancery district in which the defendant resides, or in the district in which the parties resided when the separation occurred; if the defendant is a non-resident, then in the district in which the other party to the marriage resides.

§ 2330. When the defendant is a non-resident, the other party to the marriage must have been a *bona fide* resident of this state for one year next before the filing of the bill, which must be alleged in the bill and proved.

## ARIZONA.

(Revised Statutes 1887.)

§ 2112. No suit for divorce from the bonds of matrimony shall be maintained in the courts unless the complainant for such divorce shall, at the time of exhibiting his or her complaint, be an actual *bona fide* resident of the territory, and shall have resided in the county where the suit is filed six months next preceding the filing of the suit.

## ARKANSAS.

(Digest 1884.)

§ 2562. The plaintiff, to obtain a divorce, must allege and prove in addition to a legal cause for divorce:

*First.* A residence in the state for one year next before the commencement of the action.

*Second.* That the cause for divorce occurred or existed in this state, or, if out of the state, either that it was a cause for divorce in the state where it occurred or existed, or that the plaintiff's residence was then in this state.

## CALIFORNIA.

(Amendment of 1891.)

§ 128. A divorce must not be granted unless the plaintiff has been a resident of the state for one year, and of the county in which the action is brought three months, next preceding the commencement of the action.

## COLORADO.

(Session Law 1893.)

§ 6. No person shall be entitled to a divorce in this state unless such person shall have been a *bona fide* resident and citizen of the state for one year prior to the commencement of the action, which fact shall be proven by the evidence of at least one credible witness other than the plaintiff;

*Provided*, that this section shall not affect applications for divorce upon the grounds of adultery or extreme cruelty, where the offense was committed within the state;

*Provided, further*, that such suit shall only be brought in the county in which such plaintiff or defendant reside, or where such defendant last resided.

## CONNECTICUT.

(General Statutes 1888.)

§ 2806. If the plaintiff shall not have continuously resided in this state three years next before the date of the complaint, it shall be dismissed, unless the cause for divorce shall have arisen subsequently to the removal into this state, or unless the defendant shall have continuously resided in this state three years next before the date of the complaint, and actual service shall have been made upon him, or unless the alleged cause is habitual intemperance or intolerable cruelty, and the plaintiff was domiciled in this state at the time of the marriage, and before bringing the complaint has returned to this state with the intention of permanently remaining.

## DAKOTA.

See North Dakota and South Dakota.

## FLORIDA.

(Revised Statutes 1891.)

§ 1478. In order to obtain a divorce, the complainant must have resided two years in the state of Florida before filing the bill.

## GEORGIA.

(Laws 1893.)

No court in this state shall grant divorce of any character to any person or persons who has not been a *bona fide* resident of the state twelve months before the filing of said application for divorce.

## IDAHO.

(Revised Statutes 1887.)

§ 2469. A divorce must not be granted unless the plaintiff has been a resident of the territory for six months next preceding the commencement of the action.

## ILLINOIS.

(Starr's Annotated Statutes 1885.)

§ 2. No person shall be entitled to a divorce in pursuance of the provisions of this act who has not resided in the state one whole year next before filing his or her bill or petition, unless the offense or injury complained of was committed within this state, or whilst one or both of the parties resided in this state.

## INDIANA.

(Revised Statutes 1888.)

§ 1031. Divorce may be decreed by the superior and circuit courts of this state on petition filed by any person who, at the time of the filing of such petition, is and shall have been a *bona fide* resident of the state for the last two years previous to the filing of the same, and a *bona fide* resident of the county at the time of and for at least six months immediately preceding the filing of such petition; which *bona fide* residence shall be duly proven by such petitioner to the satisfaction of the court trying the same, by at least two witnesses who are resident freeholders and householders of the state. And the plaintiff shall, with his petition, file with the clerk of the court an affidavit subscribed and sworn to by himself, in which he shall state the length of time he has been a resident of the state, and stating particularly the place, town, city or township in which he has resided for the last two years past, and stating his occupation, which shall be sworn to before the clerk of the court in which said complaint is filed.

## IOWA.

(McClain's Annotated Statutes 1888.)

§ 3412. Except where the defendant is a resident of this state served by personal service, the petition for divorce, in addition to the facts on account of which the plaintiff claims the relief sought, must state that the plaintiff has been for the last year a resident of the state, specifying the town and county in which he has so resided, and the entire length of his residence therein, after deducting all absences from the state; that he is now a resident thereof; that such residence has been in good faith and not for the purpose of obtaining divorce only.

## KANSAS.

§ 640. The plaintiff in an action for divorce must have been an actual resident, in good faith, of the state, for one year next preceding the filing of the petition, and a resident of the county in which the action is brought at the time the petition is filed.

**KENTUCKY.**

§ 4. Action for divorce must be brought in the county where the wife usually resides, if she has an actual residence in the state; if not, then in the county of the husband's residence; and no such action shall be brought by one who has not been a continuous resident of this state for a year next before its institution; nor unless the party complaining had an actual residence here at the time of the doing of the act complained of, shall a divorce be granted for anything done out of the state, unless it was also a cause for divorce by the law of the country where the act was done.

**MAINE.**

(Act 1893.)

§ 1. A divorce . . . may be decreed, . . . in the county where either party resides at the commencement of proceedings, . . . provided the parties were married in this state or cohabited here after marriage, or if the libelant resides here when the cause for divorce accrued, or had resided here in good faith for one year prior to the commencement of proceedings.

**MARYLAND.**

(Public General Laws 1888.)

§ 35. The courts of equity of this state shall have jurisdiction of all applications for divorce; and any person desiring a divorce shall file his or her bill in the court, either where the party plaintiff or defendant resides; or, if the party against whom the bill is filed be a non-resident, then such bill may be filed in the court where the plaintiff resides.

**MASSACHUSETTS.**

(Public Statutes 1882.)

§ 4. Except as provided in the following section, no divorce shall be decreed if the parties have never lived together as husband and wife in the commonwealth; nor shall a divorce be decreed for a cause occurring in another state or country, unless before such cause occurred the parties had lived together as husband and wife in the commonwealth, and one of them lived in the commonwealth at the time when the cause occurred.

§ 5. When the libelant has resided in the commonwealth for five years next preceding the filing of the libel, or, if the parties were inhabitants of the commonwealth at the time of the marriage, when the libelant has been such an inhabitant for three years next preceding such filing, a divorce may be decreed for any cause allowed by law, whether it occurred in the commonwealth or elsewhere, unless it appears that the libelant has removed into the commonwealth for the purpose of obtaining a divorce.

## MICHIGAN.

(Howell's Annotated Statutes 1882.)

§ 6239. No divorce shall be granted unless the party exhibiting the petition or bill of complaint therefor shall have resided in this state one year immediately preceding the time of exhibiting such petition or bill; or unless the marriage was solemnized in this state, and the complainant shall have resided in this state from the time of such marriage to the time of exhibiting the petition or bill.

(Act of 1887.)

§ 9. No divorce shall be granted unless the party exhibiting the petition or bill of complaint therefor shall have resided in the state one year immediately preceding the time of exhibiting such petition or bill, or unless the marriage was solemnized in the state, and the complainant shall have resided in this state from the time of such marriage to the time of exhibiting the petition or bill; and when the cause for divorce occurred out of this state, no divorce shall be granted unless the complainant or defendant shall have resided within this state two years next preceding the filing of the petition or bill; and no proofs or testimony shall be taken in any cause until four months after the filing of such petition or bill for divorce, except where the cause for divorce is desertion, or when the testimony is taken conditionally for the purpose of perpetuating such testimony.

## MINNESOTA.

(Statutes 1878.)

§ 8. No divorce shall be granted unless the complainant has resided in this state one year immediately preceding the time of exhibiting the complaint, except for adultery committed while the complainant was a resident of this state.

## MISSISSIPPI.

(Annotated Statutes 1892.)

§ 1567. The jurisdiction of the chancery court in suits for divorce shall be confined to the following classes of cases:

(a) Where both parties were domiciled within this state when the suit was commenced; or,

(b) Where the complainant was domiciled within this state when the suit was commenced and the defendant was personally served with process within this state; or,

(c) Where one of the parties was domiciled within this state when the action was commenced, and one or the other of them actually resided within this state for one year next preceding the commencement of the suit.

## MISSOURI.

(Revised Statutes 1889.)

§ 4503. No person shall be entitled to a divorce from the bonds of matrimony who has not resided within the state one whole year next before filing of the petition, unless the offense or injury complained of was committed within this state, or whilst one or both of the parties resided within this state.

## MONTANA.

§ 1001. No person shall be entitled to a divorce in pursuance of the provisions of this chapter who has not resided in this territory one whole year previous to filing his or her bill, unless the offense or injury complained of was committed within this territory, or whilst one or both of such parties resided in this territory.

## NEBRASKA.

(Cobbeys Statutes 1883.)

§ 1424. No divorce shall be granted unless the complainant shall have resided in this state for six months immediately preceding the time of filing the complaint, or unless the marriage was solemnized in this state, and the applicant shall have resided therein from the time of marriage to the time of filing the complaint.

## NEVADA.

(General Statutes 1885.)

§ 491. Divorce from the bonds of matrimony may be obtained by complaint under oath to the district court of the county in which the cause therefor shall have accrued; or in which the defendant shall reside or be found; or in which the plaintiff shall reside, if the latter be either the county in which the parties last cohabited, or in which the plaintiff shall have resided six months before the suit be brought. . . .

## NEW JERSEY.

(Session Laws 1889.)

The court of chancery shall have jurisdiction of all causes of divorce and of alimony or maintenance by this act directed and allowed; provided the parties complainant and defendant, or either of them, were or shall be inhabitants of this state at the time of the injury, desertion or neglect complained of, or where the marriage shall have been solemnized or taken place within this state, and the complainant shall have been an actual resident in the state at the time of the injury, desertion or neglect complained of, and at the time of exhibiting the bill; or where the adultery was committed in this state, and the parties com-

plainant and defendant, or either of them, reside in this state at the time of exhibiting the bill; or where the complainant or defendant shall be a resident of this state at the time of filing the bill of complaint; and the complainant or defendant shall have been a resident of this state for the term of two years, during which such desertion shall have continued.

#### NEW MEXICO.

(Compiled Laws 1884.)

§ 2282. Hereafter no person shall commence any action for divorce in any court of this territory unless such person has been a *bona fide* resident of the territory for the period of six months. Evidence of such residence, satisfactory to the judge trying the case, shall be required by such judge before granting any judgment of divorce.

#### NEW YORK.

(Annotated Code 1888.)

§ 1756. In either of the following cases, a husband or a wife may maintain an action against the other party to the marriage, to procure a judgment divorcing the parties and dissolving the marriage, by reason of the defendant's adultery:

1. Where both parties were residents of the state when the offense was committed.
2. Where the parties were married within the state.
3. Where the plaintiff was a resident of the state when the offense was committed, and is a resident thereof when the action is commenced.
4. Where the offense was committed within the state, and the injured party, when the action is commenced, is a resident of the state.

#### NORTH CAROLINA.

(Code 1883.)

§ 1287. The plaintiff in a complaint seeking either divorce or alimony, or both, shall file with his or her complaint an affidavit . . . that complainant has been a resident of the state for two years next preceding the filing of the complaint.

#### NORTH DAKOTA.

§ 2578. A divorce must not be granted unless the plaintiff has, in good faith, been a resident of the territory ninety days next preceding the commencement of this action.

#### OHIO.

(Revised Statutes 1886.)

§ 5690. The plaintiff, except in an action for alimony alone, shall have been a resident of the state at least one year before filing the petition;

all actions for divorce or for alimony shall be brought in the county where the plaintiff has a *bona fide* residence at the time of filing the petition, or in the county where the cause of action arose; and the court shall hear and determine the same, whether the marriage took place or the cause of divorce occurred within or without the state.

#### OKLAHOMA.

(Code 1893.)

§ 665. The plaintiff in an action for divorce must have been an actual resident, in good faith, of the territory for ninety days next preceding the filing of the petition, and a resident of the county in which the action is brought at the time the petition is filed.

#### OREGON.

(Hill's Annotated Laws 1887.)

§ 497. In a suit for the dissolution of the marriage contract, the plaintiff therein must be an inhabitant of the state at the commencement of the suit and for one year prior thereto, which residence shall be sufficient to give the court jurisdiction, without regard to the place where the marriage was solemnized or the cause of suit arose.

#### PENNSYLVANIA.

(Laws 1891.)

§ 1. Be it enacted, etc., that the jurisdiction conferred in and by said act to which this is a supplement is hereby extended to all cases of divorce from the bonds of matrimony and from bed and board, and for the causes therein mentioned, where it shall be shown to the court by the petition of any wife that she was formerly a citizen of this commonwealth, and that, having intermarried with a citizen of any other state or any foreign country, she has been compelled to abandon the habitation and domicile of her husband in such other state or foreign country by reason of his adultery or of his cruel and barbarous treatment, or of such indignities to her person as to render her condition intolerable and her life burdensome, or wilful or malicious desertion and absence from the habitation of the other without a reasonable cause, and has thereby been forced to return to her former domicile within this commonwealth: *Provided*, that where in any such case personal services of the subpoena cannot be made upon such husband by reason of his non-residence within this commonwealth, the court, before entering a decree of divorce, shall require proof that, in addition to the publication now required by law, notice of said proceedings has been given to such non-resident husband either by personal service or by registered letter to his last known place of residence, and that a full opportunity has thereby been afforded to him to appear and defend

in said suit: *And provided further*, that no application for such divorce shall be made unless the applicant therefor shall be a citizen of this commonwealth or shall have actually resided therein for the term of one year prior to filing her petition, as provided by the existing laws of this commonwealth.

#### RHODE ISLAND.

(Public Statutes 1882.)

§ 15. Said court shall have no cognizance of or jurisdiction over any petition for the same or either of the same, unless the petitioner shall, at the time of preferring such petition, be a domiciled inhabitant of this state and have resided therein for a period of one year next before the preferring of such petition.

#### SOUTH DAKOTA.

(Session Laws 1893.)

§ 2578. A divorce must not be granted unless the plaintiff in good faith has been a *bona fide* resident of the state of South Dakota for at least six months next preceding the commencement of the action; and in no case shall a divorce be granted without personal service of the summons within this state, or personal service of the summons and order of publication in case of a non-resident defendant, until the plaintiff shall have been a *bona fide* resident of this state for one year next preceding the granting of such divorce.

#### TENNESSEE.

(Code, M. & V. 1884.)

§ 3308. A divorce may be granted for any of the aforesaid causes, though the acts complained of were committed out of the state, or the petitioner resided out of the state at the time, no matter where the other party resides, if the petitioner has resided in this state two years next preceding the filing of the petition.

#### TEXAS.

(Sayles' Texas Civil Statutes 1888.)

§ 2862. No suit for divorce from the bonds of matrimony shall be maintained in the courts, unless the petitioner for such divorce shall, at the time of exhibiting his or her petition, be an actual *bona fide* inhabitant of the state, and shall have resided in the county where the suit is filed, six months next preceding the filing of the suit.

#### UTAH.

(Compiled Laws 1888.)

§ 2602. Proceedings in divorce shall be commenced and conducted in the manner provided by law for proceedings in civil cases, except as hereinafter provided, and the court may decree a dissolution of the

marriage contract between the plaintiff and defendant in all cases wherein the plaintiff, for one year next prior to the commencement of the proceedings, shall have been an actual and *bona fide* resident of the county within the jurisdiction of the court.

#### VERMONT.

(Revised Laws 1880.)

§ 2365. The libelant petitioning for a divorce for adultery or intolerable severity or wilful desertion, when the cause of action accrued without the state, shall have been an inhabitant of the state two years next previous to the bringing of the petition, and of the county where such petition is preferred one year next previous to the term of the court to which the petition is preferred.

#### VIRGINIA.

(Code 1887.)

§ 2259. The circuit and corporation courts, on the chancery side thereof, shall have jurisdiction of suits for annulling or affirming marriages and for divorces. No suit for annulling a marriage or for divorce shall be maintainable unless one of the parties has been domiciled in this state for at least one year preceding the commencement of the suit; nor shall any suit for affirming a marriage be maintainable unless one of the parties be domiciled in this state at the time of bringing such suit. The suit, in either case, shall be brought in the county or corporation in which the parties last cohabited, or (at the option of the plaintiff) in the county or corporation in which the defendant resides, if a resident of this state, and if not a resident, in the county or corporation in which the plaintiff resides.

#### WASHINGTON.

(Hill's Annotated Statutes 1891.)

§ 766. Any person who has been a resident of the state for one year may file his or her complaint for a divorce or decree of nullity of marriage, under oath, in the superior court of the county where he or she may reside, and like proceeding shall be had thereon as in civil cases.

#### WEST VIRGINIA.

(Code 1887.)

Ch. 64, § 7. The circuit court, on the chancery side thereof, shall have jurisdiction of suits for annulling or affirming marriages, or for divorces. No such suit shall be maintainable unless the parties, or one of them, shall have resided in the state one year next preceding the time of bringing such suit. The suit shall be brought in the county in which the parties last cohabited, or (at the option of the plaintiff) in the county in which the defendant resides, if a resident of this state; but if not, then in the county in which the plaintiff resides.

## WISCONSIN.

(Revised Statutes 1878.)

§ 2359. No divorce shall be granted unless the plaintiff shall have resided in this state one year immediately preceding the time of the commencement of the action, except for adultery alleged to have been committed while the plaintiff was a resident of this state; or unless the marriage was solemnized in this state, and the plaintiff shall have resided therein from the time of such marriage to the time of the commencement of the action; or unless the action be brought by the wife, and the husband shall have resided in this state for one year next preceding the commencement thereof.

## WYOMING.

(Revised Statutes 1887.)

§ 1572. No divorce shall be granted unless the plaintiff shall have resided in this territory for six months immediately preceding the time of filing the petition; or unless the marriage was solemnized in this territory, and the applicant shall have resided therein from the time of the marriage to the time of filing the petition.

## ENGLAND.

(Statutes 20 &amp; 21 Vict., ch. 85.)

## CAUSES FOR ABSOLUTE DIVORCE.

§ 27. It shall be lawful for any husband to present a petition to the said court, praying that his marriage may be dissolved on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion without reasonable excuse for two years or upwards.

And every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded: provided, that for the purposes of this act incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom if his wife were dead he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity.

And bigamy shall be taken to mean marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of her majesty or elsewhere.

## CAUSES FOR JUDICIAL SEPARATION.

§ 7. No decree shall hereafter be made for a divorce *a mensa et thoro*; but in all cases in which a decree for a divorce *a mensa et thoro* might now be pronounced, the court may pronounce a decree for a judicial separation, which shall have the same force and the same consequence as a divorce *a mensa et thoro* now has.

§ 16. A sentence of judicial separation (which shall have the effect of a divorce *a mensa et thoro* under the existing law and such other legal effect as herein mentioned) may be obtained, either by the husband or wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards.

## ADULTERER A CO-RESPONDENT.

§ 28. Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition,

unless on special grounds to be allowed by the court he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage, the court, if it sees fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent; and the parties or either of them may insist on having the contested matters of fact tried by a jury as hereinafter mentioned.

#### WHEN DIVORCE REFUSED.

§ 29. Upon any such petition for the dissolution of a marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and shall also inquire into any counter-charge which may be made against the petitioner.

§ 30. In case the court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of said cases the court shall dismiss the said petition.

§ 31. In case the court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the court shall pronounce a decree declaring such marriage to be dissolved: provided always, that the court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

#### DECREE *NISI*.

§ 7. "Every decree for a divorce shall in the first instance be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the court shall by general or special order from time to time direct; and during that period any person shall be at liberty, in such manner

as the court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not brought before the court; and on cause being so shown the court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise as justice may require."

#### INTERVENTION OF QUEEN'S PROCTOR.

"And, at any time during the progress of the cause, or before the decree is made absolute, any person may give information to her majesty's proctor of any matter material to the due decision of the case, who may thereupon take such steps as the attorney-general may deem necessary or expedient; and if from any information or otherwise the said proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the attorney-general, and by leave of the court, intervene in the suit, alleging such case of collusion, and retain counsel and subpoena witnesses to prove it; and it shall be lawful for the court to order the costs of such counsel and witnesses, and otherwise, arising from such intervention, to be paid by the parties or such of them as it shall see fit, including a wife if she have separate property; and in case the said proctor shall not thereby be fully satisfied his reasonable costs, he shall be entitled to charge and be reimbursed the difference as a part of the expense of his office." This act was, by its terms, to continue only for a limited period; but it was made perpetual by 25 & 26 Vict., ch. 81. By 29 & 30 Vict., ch. 32, § 3, it was provided that "no decree *nisi* for a divorce shall be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the court shall, under the power now vested in it, fix a shorter time." By 36 Vict., ch. 31, these several provisions were extended to suits for the nullity of marriage.

#### AD INTERIM ORDERS AND FINAL DECREES RELATING TO TEMPORARY ALIMONY, CUSTODY, MAINTENANCE AND EDUCATION OF CHILDREN.

By 20 & 21 Vict., ch. 85, § 35, it is provided that in any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the court of chancery.

**ALIMONY ON DISSOLUTION OF MARRIAGE.**

Section 32 of the same act provides that the court may, if it shall think fit, on any such decree, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune, if any, to the ability of the husband, and to the conduct of the parties, it shall deem reasonable; and for that purpose may refer it to any one of the conveyancing counsel of the court of chancery to settle, and approve of a proper deed or instrument to be executed by all necessary parties; and the said court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed.

And upon any petition for dissolution of marriage the court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise, to the wife, as it would have in a suit instituted for judicial separation.

§ 24. In all cases in which the court shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf, to be approved by the court, and may impose any terms or restrictions which to the court may seem expedient, and may from time to time appoint a new trustee, if for any reason it shall appear to the court expedient so to do.

§ 45. In any case in which the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them.

By 22 & 23 Vict., ch. 61, sec. 5, the court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of any ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the court shall seem fit.

**ALIMONY WHERE THE HUSBAND HAS NO PROPERTY.**

The act 29 & 30 Vict., ch. 82, § 1, empowers the court, in every case where a decree for dissolution of marriage is obtained against a husband who has no property on which the payment of a gross or annual sum of money can be secured to the wife, but he is able, nevertheless, to make a monthly or weekly payment to the wife during their joint lives, to make an order on the husband for payment to the wife during

their joint lives of such monthly or weekly sums for her maintenance as the court may think reasonable: provided, that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful to discharge or modify the order, or temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again to revise the same order, wholly or in part.

**STATUTES RELATING TO CONSTRUCTIVE SERVICE.****ALABAMA.**

**Notice is served as in other chancery suits.**

**ARIZONA.**

**As in other civil cases.**

**ARKANSAS.**

**As in other chancery suits.**

**COLORADO.**

(Session Laws 1894.)

**§ 3.** In every action for a divorce, personal service of a copy of the summons, to which shall be attached a copy of the complaint, shall be made upon the defendant, except as provided in section 4 hereof. If such service shall be made within the state of Colorado, then such defendant shall have thirty days thereafter within which to appear and plead to said complaint; if the defendant be not within the state of Colorado, then personal service upon such defendant of a copy of the summons and complaint may be made by the sheriff of the county in which such defendant may be found, and the return of such sheriff, showing such personal service, shall be held to be a sufficient service to give the court jurisdiction in such case; and in case of such service outside of the state of Colorado, such defendant shall have fifty days from the date of such service within which to appear and plead to such complaint; and in all cases the time within which such appearance must be made shall be stated in the summons.

**§ 4.** In any case in which a party has committed any act which under the terms of this act would entitle the husband or wife to a divorce, and the party committing such act has left the state of Colorado, and the whereabouts of such person is unknown to the plaintiff, the plaintiff may file an application to the court to make service upon such absent party by publication; such application shall be made under oath, and shall state fully and in detail all of the knowledge of the plaintiff concerning the departure of such absent party, and shall state all facts within the knowledge of the applicant which might assist in ascertaining the address of such absent party. The court in which such application is filed, or the judge thereof in vacation, shall, whenever such

application shall be heard, carefully examine the plaintiff and such other witnesses as may be produced, in order to determine what steps shall be taken to notify such absent defendant, and may cause copies of the summons to be sent by the clerk, together with letters of inquiry, to any and all places as the court may determine. And the court shall also, if satisfied of the good faith of the application, cause the summons to be published in the same manner and with like effect as is now provided by law for the publication of summons in cases of attachment.

#### CONNECTICUT.

(General Statutes 1888.)

§ 2804. On all such complaints, where the adverse party resides out of or is absent from this state, any judge or clerk of the supreme court of errors, or of the superior court, or any county commissioner, may, in vacation, make such order of notice to the adverse party as he may deem reasonable; and such notice having been given and duly proved to the court, it may hear such complaint if it finds that defendant has actually received notice that the complaint is pending; and if it shall not appear that the defendant has had such notice, the court shall order such notice to be given as it may deem reasonable, and continue the complaint until the order has been complied with.

#### DELAWARE.

(Laws 1893.)

If service cannot be made of the summons, an *alias* summons shall issue to the next term, which the sheriff shall publish for (one) month in such newspapers, one or more, as he shall judge best for giving the defendant notice, and such proceedings shall then be had as are provided for in case of service of the summons, either with or without the defendant's appearance.

#### DISTRICT OF COLUMBIA.

If it shall appear by the affidavit of a disinterested witness that the defendant is a non-resident of the district, or has been absent therefrom for the space of six months, the court, after the return of the summons "not found," may authorize notice of the pendency of the petition to be given by publication in such manner as shall be directed.

#### FLORIDA.

§ 1482. Bills for divorce may be brought against defendants residing out of the state, and service shall be effected upon them as in other cases in chancery.

## GEORGIA.

§ 1717. The action for divorce shall be by petition and process as in ordinary suits, filed and served as in other cases, unless the defendant be a non-resident of this state, when service shall be perfected as prescribed in causes of equity.

## IDAHO.

No provision.

## ILLINOIS.

§ 6. The process, practice and proceedings under this act shall be the same as in other cases in chancery.

## INDIANA.

§ 1036. If it shall appear by the affidavit of a disinterested person that the defendant is not a resident of this state, the clerk shall give notice of the pendency of such petition by publication for three successive weeks in some weekly newspaper of general circulation published in such county, or, if there be no such paper, then in one published in this state nearest to the county seat of such county: Provided, that the plaintiff shall, in case such notice is to be given by publication as aforesaid, before the same is given, file his or her affidavit with the clerk, stating therein the residence of the defendant, if such residence be known to the plaintiff; and if such residence be unknown to the plaintiff, such affidavit shall so state; and in case such affidavit state the residence of the defendant, the clerk shall forward, by mail, to such defendant the number of the paper containing such notice, with the notice marked.

## IOWA.

§ 3823. Service may be made by publication (as in other actions) . . . if the defendant is a non-resident of the state of Iowa or his residence is unknown.

## KANSAS.

§ 641. The petition must be verified as true by the affidavit of the plaintiff. A summons may issue thereon, and shall be served, or publication made, as in other cases. When service by publication is proper, a copy of the petition, with a copy of the publication notice attached thereto, shall, within three days after the first publication is made, be inclosed in an envelope addressed to the defendant at his or her place of residence, postage paid, and deposited in the nearest postoffice, unless the plaintiff shall make and file an affidavit that such residence is unknown to the plaintiff, and cannot be ascertained by any means within the control of the plaintiff.

## LOUISIANA.

(Revised Code 1888.)

§ 141. When the defendant is absent or incapable of acting from any cause, an attorney shall be appointed to represent him, against whom, contradictorily, the suit shall be prosecuted.

## MARYLAND.

§ 35. The same process, by summons, notice or otherwise, shall be had to procure the answer and appearance of a defendant as is had in other cases in chancery.

## MASSACHUSETTS.

(Public Statutes 1882.)

§ 9. The court, justice or clerk may order the adverse party to be summoned to appear and answer at the court having jurisdiction of the cause, by the publication of the libel or of the substance thereof, with the order thereon, in one or more newspapers to be designated in the order, or by delivering to such party an attested copy of the libel and a summons, or in such other manner as may seem most proper and effectual; but when such order is made by a clerk, the court or any justice thereof may order such additional notice to be given as may seem proper.

§ 10 (amended 1890). When the adverse party does not appear, and the notice of the pendency of the libel is considered by the court to be defective or insufficient, it may order such further notice as it may consider proper, . . .

## MINNESOTA.

§ 12. Copies of the summons and complaint shall be served on the defendant personally; and when such service is made out of this state it may be proved by the affidavit of the person making the same, with the certificate of the clerk of the court of the county, to the identity of the officer taking the affidavit; but if personal service cannot well be made, the court may order service of summons by publication as in other actions.

## MISSISSIPPI.

§ 1569. The bill must be filed in the county in which the complainant resides, if the defendant be a non-resident of this state or be absent, so that process cannot be served; and the manner of making such parties defendants so as to authorize a decree against them in other chancery cases shall be observed.

## MISSOURI.

§ 4501. . . . Like process and proceeding shall be had in such causes as are had in other civil suits, except the answer of defendant shall not be under oath.

## MONTANA.

§ 1000. . . . Like process, practice and proceedings shall be had as they are usually had in other cases in chancery.

## NEBRASKA.

§ 1426. . . . Where personal service cannot be had, service by publication may be made as is provided by law in other cases under the Code of Civil Procedure.

## NEVADA.

§ 492. If the defendant is not a resident of the territory or cannot, for any cause, be personally summoned, the court or judge, in vacation, may order notice of the pendency of the suit to be given in such manner and during such time as shall appear most likely to convey a knowledge thereof to the defendant, without undue expense or delay; and if no such order shall be made, it shall be sufficient to publish such notice in a weekly newspaper, printed in, or nearest to, the county in which the suit is pending, three months in succession.

## NEW HAMPSHIRE.

§ 5. All libels for divorce shall be brought in the county in which the parties, or one of them, live, and before the supreme court holden in or for such county; and such notice of the pendency thereof shall be given to the libellee, personal or otherwise, as the court shall order.

## NEW JERSEY.

§ 13. In case a petition as aforesaid shall be filed, and it shall be made to appear, by affidavit or otherwise, to the satisfaction of the chancellor, that such defendant is out of this state, or cannot upon due inquiry be found therein, or that he or she conceals himself or herself within this state, the chancellor may thereupon, by order, direct such defendant to answer the said petition at a certain day therein named, not less than two nor more than six months from the date of such order, which order shall, within twenty days thereafter, be served on such defendant by delivery of a copy thereof to him or her, or by leaving it at his or her dwelling-house or usual place of abode, or be published in one of the newspapers printed in this state, and designated in such order, and continued therein for five weeks successively, at least once in every week, and shall be published in such other manner as

the particular circumstances of the case may require, if in the opinion of the chancellor any other or further publication shall be necessary; and in case such defendant shall not file his or her answer within the time so limited, or within some further time to be allowed by the chancellor, on proof of due service or publication of said order the court may order and direct the petitioner to produce depositions or other evidence to substantiate and prove the allegations in the petition, and the said petitioner may then proceed *ex parte*, and bring on the hearing of said cause.

#### NEW MEXICO.

§ 2283. Service of process in actions for divorce, by publication, can only be made after obtaining from a judge of the supreme court an order allowing the same. The affidavit or affidavits on which such order is asked must show the present residence of the defendant, if known, or the last known place of such residence, with its date and the efforts made to ascertain the present residence; and the order shall direct, in addition to the publication provided by law in the case of non-resident defendants, that a copy of the summons shall be mailed, postpaid, to the present or last known place of residence of the defendant, and may direct such other means of bringing the action to the knowledge of the defendant as to the judge shall seem proper under the circumstances of any particular case.

#### NORTH CAROLINA.

Same service as in other civil actions.

#### NORTH DAKOTA.

See page 1087.

#### OHIO.

§ 5692. When the defendant is a resident of this state the clerk shall issue a summons directed to the sheriff of the county in which he or she resides or is found, which, together with a copy of the petition, shall be served on the defendant at least six weeks before the hearing of the cause.

§ 5693. Where the defendant is not a resident of the state, or his residence is unknown, notice of the pendency of the action must be given by publication as in other cases; and unless it be made to appear to the court, by affidavit or otherwise, that his residence is unknown to the plaintiff and could not with reasonable diligence be ascertained, a summons and a copy of the petition shall forthwith, on the filing of the petition, be deposited in the postoffice, directed to the defendant at his place of business.

## OKLAHOMA.

§ 666. The petition must be verified as true by the affidavit of the plaintiff. A summons may issue thereon, and shall be served, or publication made, as in other cases. When service by publication is proper, a copy of the petition, with a copy of the publication notice attached thereto, shall, within three days after the first publication is made, be inclosed in an envelope addressed to the defendant at his or her place of residence, postage paid, and deposited in the nearest postoffice, unless the plaintiff shall make and file an affidavit that such residence is unknown to the plaintiff, and cannot be ascertained by any means within the control of the plaintiff.

## OREGON.

No provision.

## PENNSYLVANIA.

(Brightley's Purdon's Digest, 614.)

§ 13. . . . If, on the return of the said alias subptena, proof shall be made that the said party could not be found in the said county, the sheriff of the same shall cause notice to be published in one or more newspapers printed within or nearest to the said county, for four weeks successively, prior to the first day of the then next term of said court, requiring the said party to appear on the said day to answer to the said complaint, at which term, or any subsequent term, the same proceedings shall be had as are authorized and directed by the second section of this act.

## RHODE ISLAND.

§ 17. The said (supreme) court may, by general rule or otherwise, prescribe the notice to be given, within or without the state, on such petitions, and may issue such processes as may be necessary to carry into effect all powers conferred upon them in relation to the same.

## TENNESSEE.

§ 3312. The complainant, upon giving security for costs, shall have the usual process to compel the defendant to appear and answer the bill; or it may be taken as confessed, as in other chancery cases; and if the divorce be demanded because the defendant is a convict confined in the penitentiary, the bill may be taken for confessed, upon publication, as if he were a non-resident.

§ 3314. If a woman sue for divorce, her bill or petition may be heard and a divorce granted, without service of the subpoena or publication, if her bill was filed, and subpoena for the defendant was placed in the hands of the sheriff of the county in which the suit is instituted, three months before the time when the subpcena is returnable; but the officer having the subpoena shall execute it if he can.

**TEXAS.**

As in other civil suits.

**UTAH.**

As in other civil suits.

**VERMONT.**

§ 2372. If the party complained of is without the state, the libelant may file his libel in the office of the clerk of the court, in the county where the same is required to be brought, and such clerk shall issue an order stating the substance of the libel or petition, and requiring the adverse party to appear on the first day of the next stated term of the county court in said county and make answer to such libel or petition, which order the libelant shall cause to be published in such newspapers as is directed by such order three weeks successively, the last publication to be at least six weeks previous to the commencement of the term at which such libellee is required to appear; and a judge of the supreme court may grant to a party to a libel an order of notice by publication, or in such other manner as he judges proper or effectual.

**VIRGINIA.**

As in other suits in equity.

**WASHINGTON.**

§ 776. The practice in civil actions shall govern all proceedings in the trial of actions for divorce, except that trial by jury is dispensed with.

**WEST VIRGINIA.**

As in other suits in equity.

**WISCONSIN.**

As in other actions.

**WYOMING.**

As in civil actions.

## CALIFORNIA CODE.

For law of Idaho, see secs. 83, 92, 128 note, and sec. 141.

The Code of North and South Dakota is the same except as indicated herein.

SEC. 55. Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights or obligations.

SEC. 56. Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage.

SEC. 57. Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

SEC. 58. If either party to a marriage be incapable from physical causes of entering into the marriage state, or if the consent of either be obtained by fraud or force, the marriage is voidable.

SEC. 59. Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous and void from the beginning, whether the relationship is legitimate or illegitimate.

SEC. 60. All marriages of white persons with negroes or mulattoes are illegal and void.

SEC. 61. A subsequent marriage contracted by any person during the life of a former husband or wife of such person with any person other than such former husband or wife is illegal and void from the beginning, unless:

1. The former marriage has been annulled or dissolved.
2. Unless such former husband or wife was absent, and not known to such person to be living, for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted, in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

SEC. 62. Neither party to a contract to marry is bound by a promise made in ignorance of the other's want of personal chastity, and either is released therefrom by unchaste conduct on the part of the other unless both parties participate therein.

SEC. 63. All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state.

SEC. 68. Marriage must be licensed, solemnized, authenticated and recorded as provided in this article; but non-compliance with its provisions does not invalidate any lawful marriage.

SEC. 69. All persons about to be joined in marriage must first obtain a license therefor from the county clerk of the county in which the marriage is to be celebrated, showing:

1. The identity of the parties.
2. Their real and full names and places of residence.
3. Their ages.
4. If the male be under the age of twenty-one, or the female under the age of eighteen years, the consent of the father, mother or guardian, or of the one having the charge of such person, if any such be given; or that such non-aged person has been previously, but is not at the time, married.

For the purpose of ascertaining these facts, the clerk is authorized to examine parties and witnesses on oath, and to receive affidavits, and he must state such facts in the license. If the male be under the age of twenty-one years, or the female be under the age of eighteen, and such person has not been previously married, no license shall be issued by the clerk, unless the consent, in writing, of the parents of the person under age, or of one of such parents, or of his or her guardian, or of one having charge of such person, be presented to him; and such consent shall be filed by the clerk; provided, that the said clerk shall not issue a license authorizing the marriage of a white person with a negro, mulatto or Mongolian.

SEC. 70. Marriage may be solemnized by either a justice of the supreme court, judge of the superior court, justice of the peace, priest or minister of the gospel of any denomination.

SEC. 71. No particular form for the ceremony of marriage is required, but the parties must declare, in the presence of the person solemnizing the marriage, that they take each other as husband and wife.

SEC. 72. The person solemnizing a marriage must first require the presentation of the marriage license; and if he has any reason to doubt the correctness of its statement of facts, he must first satisfy himself of its correctness, and for that purpose he may administer oaths and examine the parties and witnesses in like manner as the county clerk does before issuing the license.

SEC. 73. The person solemnizing a marriage must make, sign, and indorse upon, or attach to, the license, a certificate showing:

1. The fact, time and place of solemnization; and
2. The names and places of residence of one or more witnesses to the ceremony.

SEC. 74. He must, at the request of and for either party, make a certified copy of the license and certificate, and file the originals with the county recorder within thirty days after the marriage.

SEC. 75. Persons married without the solemnization provided for in section 70 must jointly make a declaration of marriage, substantially showing:

1. The names, ages and residence of the parties.
2. The fact of marriage.
3. The time of marriage.
4. That the marriage has not been solemnized.

SEC. 76. If no record of the solemnization of a marriage heretofore contracted be known to exist, the parties may join in a written declaration of such marriage, substantially showing:

1. The names, ages and residences of the parties.
2. The fact of the marriage.
3. That no record of such marriage is known to exist. Such declaration must be subscribed by the parties and attested by at least three witnesses.

SEC. 77. Declarations of marriage must be acknowledged and recorded in like manner as grants of real property.

SEC. 78. If either party to any marriage denies the same, or refuses to join in a declaration thereof, the other may proceed, by action in the superior court, to have the validity of the marriage determined and declared.

SEC. 79. When unmarried persons, not minors, have been living together as man and wife, they may, without a license, be married by any clergyman. A certificate of such marriage must, by the clergyman, be made and delivered to the parties, and recorded upon the records of the church of which the clergyman is a representative. No other records need be made.

SEC. 80. Either party to an incestuous or void marriage may proceed, by action in the superior court, to have the same so declared.

SEC. 82. A marriage may be annulled for any of the following causes, existing at the time of the marriage [sec. 2450, Code of Idaho, is the same]:

1. That the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or person having charge of him or her; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife.
2. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force.
3. That either party was of unsound mind, unless such party, after coming to reason, freely cohabited with the other as husband or wife.
4. That the consent of either party was obtained by fraud, unless such party afterward, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife.

5. That the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife.

6. That either party was, at the time of marriage, physically incapable of entering into the married state, and such incapacity continues, and appears to be incurable.

SEC. 83. An action to obtain a decree of nullity of marriage, for causes mentioned in the preceding section, must be commenced within the periods and by the parties as follows [sec. 2452, Code of Idaho]:

1. For causes mentioned in subdivision 1: By the party to the marriage who was married under the age of legal consent, within four years after arriving at the age of consent; or by a parent, guardian or other person having charge of such non-aged male or female, at any time before such married minor has arrived at the age of legal consent.

2. For causes mentioned in subdivision 2: By either party during the life of the other, or by such former husband or wife.

3. For causes mentioned in subdivision 3: By the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party.

4. For causes mentioned in subdivision 4: By the party injured, within four years after the discovery of the facts constituting the fraud.

5. For causes mentioned in subdivision 5: By the injured party, within four years after the marriage.

6. For causes mentioned in subdivision 6: By the injured party, within four years after the marriage.

SEC. 84. When a marriage is annulled on the ground that a former husband or wife was living, or on the ground of insanity, children begotten before the judgment are legitimate, and succeed to the estate of both parents.

Section 2555 of the code of North Dakota as revised by act of 1895, instead of the above section reads as follows:

"When a marriage is annulled, children begotten before the judgment are legitimate, and succeed to the estate of both parents."

SEC. 85. The court must award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party.

SEC. 86. A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them.

SEC. 90. Marriage is dissolved only:

1. By the death of one of the parties; or,
2. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties.

SEC. 91. The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons.

SEC. 92. Divorces may be granted for any of the following causes [sec. 2457, Code of Idaho]:

1. Adultery.
2. Extreme cruelty.
3. Wilful desertion [for one year, see sec. 107].
4. Wilful neglect. [Id.]
5. Habitual intemperance. [Id.]
6. Conviction of felony.

SEC. 93. Adultery is the sexual intercourse of a married person with a person other than the offender's husband or wife.

SEC. 94. Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage.

SEC. 95. Wilful desertion is the voluntary separation of one of the married parties from the other with intent to desert.

SEC. 96. Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary; or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion.

SEC. 97. When one party is induced, by the stratagem or fraud of the other party, to leave the family dwelling-place or to be absent, and during such absence the offending party departs with intent to desert the other, it is desertion by the party committing the stratagem or fraud, and not by the other.

SEC. 98. Departure or absence of one party from the family dwelling-place, caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other, is not desertion by the absent party, but it is desertion by the other party.

SEC. 99. Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion.

SEC. 100. Absence or separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such absence or separation.

SEC. 101. Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion.

SEC. 102. If one party deserts the other, and, before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured. If the other party refuse such offer and condonation, the refusal shall be deemed and treated as desertion by such party from the time of refusal.

SEC. 103. The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto it is desertion on the part of the husband from the time her reasonable objections are made known to him.

SEC. 104. If the place or mode of living selected by the husband is unreasonably and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him.

SEC. 105. Wilful neglect is the neglect of the husband to provide for his wife the common necessaries of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy or dissipation.

SEC. 106. Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a greater portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon an innocent party.

SEC. 2564. Code of North Dakota as revised by act of 1895 instead of the above section reads as follows:

"Habitual intemperance is that degree of intemperance from the use of intoxicating drinks, morphine, opium, chloral or other narcotic drugs, which disqualifies the person a greater portion of the time from properly attending to business, or which would reasonably inflict a course of great mental agony upon the innocent party."

SEC. 107. Wilful desertion, wilful neglect or habitual intemperance must continue for one year before either is ground for divorce.

SEC. 111. Divorces must be denied upon showing:

1. Connivance; or,
2. Collusion; or,
3. Condonation; or,
4. Recrimination; or,
5. Limitation and lapse of time.

SEC. 112. Connivance is the corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce.

SEC. 113. Corrupt consent is manifested by passive permission, with intent to connive at or actively procure the commission of the acts complained of.

SEC. 114. Collusion is an agreement between husband and wife that one of them shall commit, or appear to have committed, or to be represented in court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce.

SEC. 115. Condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce.

SEC. 116. The following requirements are necessary to condonations:

1. A knowledge on the part of the condoner of the facts constituting the cause of divorce.

2. Reconciliation and remission of the offense by the injured party.

3. Restoration of the offending party to all marital rights.

SEC. 117. Condonation implies a condition subsequent: that the forgiving party must be treated with conjugal kindness.

SEC. 118. Where the cause of divorce consists of a course of offensive conduct, or arises in case of cruelty from successive acts of ill

treatment which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone.

SEC. 119. In cases mentioned in the last section, condonation can be made only after the cause of divorce has become complete as to the acts complained of.

SEC. 120. A fraudulent concealment by the condonee of facts constituting a different cause of divorce from the one condoned, and existing at the time of condonation, avoids such condonation.

SEC. 121. Condonation is revoked and the original cause of divorce revived —

1. When the condonee commits acts constituting a like or other cause of divorce; or,

2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith, or not fulfilled.

SEC. 122. Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce.

SEC. 123. Condonation of a cause of divorce, shown in the answer as a recriminating defense, is a bar to such defense, unless the condonation be revoked, as provided in section 121, or two years have elapsed after the condonation, and before the accruing or completion of the cause of divorce against which the recrimination is shown.

SEC. 124. A divorce must be denied:

1. When the cause is adultery, and the action is not commenced within two years after the commission of the act of adultery, or after its discovery by the injured party; or,

2. When the cause is conviction of felony, and the action is not commenced before the expiration of two years after a pardon, or the termination of the period of sentence.

3. In all other cases when there is an unreasonable lapse of time before the commencement of the action.

SEC. 125. Unreasonable lapse of time is such a delay in commencing the action as establishes the presumption that there has been connivance, collusion or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relation notwithstanding the commission of such offense.

SEC. 126. The presumptions arising from lapse of time may be rebutted by showing reasonable grounds for the delay in commencing the action.

SEC. 127. There are no limitations of time for commencing actions for divorce, except such as are contained in section 124.

SEC. 128. A divorce must not be granted unless the plaintiff has been a resident of the state for one year and of the county in which the ac-

tion is brought three months next preceding the commencement of the action. [Amended by Act March 10, 1891.]

[Sec. 2578 of Code of Territory of Dakota, adopted by South Dakota, as amended by Act of 1893, Session Law 1893, page 97, requires six months' residence of plaintiff, and a residence of one year where the defendant is a non-resident.]

[Sec. 2578 of Code of Territory of Dakota, adopted by North Dakota, provides that the plaintiff must be a resident of the territory ninety days next preceding the commencement of the action.]

[Sec. 2469, Code of Idaho, is the same as North Dakota.]

SEC. 129. In actions for divorce the presumption of law that the domicile of the husband is the domicile of the wife does not apply. After separation each may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions.

SEC. 130. No divorce can be granted upon the default of the defendant or upon the uncorroborated statement, admission or testimony of the parties, or upon any statement or finding of fact made by a referee: but the court must, in addition to any statement or finding of the referee, require proof of the facts alleged, [and such proof, if not taken before the court, must be upon written questions and answers.]

Section 2580 of the Code of North Dakota omits that portion inclosed in brackets.

SEC. 136. Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance of the wife and her children, or any of them, by the husband.

SEC. 137. When an action for divorce is pending, the court may, in its discretion, require the husband to pay, as alimony, any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action. When the husband wilfully deserts the wife, she may, without applying for a divorce, maintain in the superior court an action against him for permanent support and maintenance of herself, or of herself and children. During the pendency of such action the court may, in its discretion, require the husband to pay, as alimony, any money necessary for the prosecution of the action, and for support and maintenance, and executions may issue therefor, in the discretion of the court. The final judgment in such action may be enforced by the court by such order or orders as, in its discretion, it may from time to time deem necessary, and such order or orders may be varied, altered or revoked at the discretion of the court.

SEC. 138. In an action for divorce the court may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same.

SEC. 139. Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support during her life, or for a shorter period, as the court may

deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects. [Sec. 2584, Code of Dakota Territory.]

SEC. 140. The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case.

Section 2585 of the Codes of North and South Dakota contains the following instead of sections 141-143, and 146-148:

"But when the wife has a separate estate sufficient to give her a proper support, the court, in its discretion, may withhold any allowance to her out of the separate property of the husband. The court, in rendering a decree of divorce, may assign the homestead to the innocent party, either absolutely or for a limited period, according to the facts in the case, and in consonance with the law relating to homesteads. The disposition of the homestead by the court, and all orders and decrees touching the alimony and maintenance of the wife, and for the custody, education and support of the children, as above provided, are subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court.

SEC. 141. In executing the five preceding sections, the court must resort: [Code of Idaho refers to four preceding sections and contains all the following provisions.]

1. To the community property; then,
2. To the separate property of the husband.

SEC. 142. When the wife has either a separate estate, or there is community property sufficient to give her alimony or a proper support, the court, in its discretion, may withhold any allowance to her out of the separate property of the husband.

SEC. 143. The community property and the separate property may be subjected to the support and education of the children in such proportions as the court deems just.

SEC. 144. When a divorce is granted for the adultery of the husband, the legitimacy of children of the marriage begotten of the wife before the commencement of the action is not affected. [Sec. 2573, Code of North Dakota.]

SEC. 145. When a divorce is granted for the adultery of the wife, the legitimacy of children begotten of her before the commission of the adultery is not affected; but the legitimacy of other children of the wife may be determined by the court upon the evidence in the case.

Section 2574 of the Codes of North and South Dakota adds: "In every such case all children begotten before the commencement of the action are to be presumed legitimate until the contrary is shown."

The Codes of North and South Dakota contain the following *prohibition of marriage after divorce*:

"SEC. 2575. When a divorce is granted for adultery, the innocent party may marry again during the life of the other; but the guilty party cannot marry any person except the innocent party until the death of the other."

SEC. 146. In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property and the homestead shall be assigned as follows:

1. If the decree be rendered on the ground of adultery or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case and the condition of the parties, may deem just.

2. If the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property shall be equally divided between the parties.

3. If a homestead has been selected from the community property, it may be assigned to the innocent party, either absolutely or for a limited period, subject in the latter case to the future disposition of the court, or it may, in the discretion of the court, be divided, or be sold and the proceeds divided.

4. If a homestead had been selected from the separate property of either, it shall be assigned to the former owner of such property subject to the power of the court to assign it for a limited period to the innocent party.

SEC. 147. The court, in rendering a decree of divorce, must make such order for the disposition of the community property and of the homestead as in this chapter provided, and, whenever necessary for that purpose, may order a partition or sale of the property and a division or other disposition of the proceeds.

SEC. 148. The disposition of the community property and of the homestead, as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court. [Secs. 164 and 172 of code, relating to community property, have been amended by act of March 3, 1893. Stats. 1893, pp. 71 and 425.]

## NORTH DAKOTA.

The Revised Code of North Dakota is not accessible, but the writer is advised by resident attorneys that the following provisions relating to constructive service will be in effect on or before January 1, 1896. Other amendments have been noted under the sections of the California code.

### SERVICE BY PUBLICATION.

. . . Service of summons in an action may be made on any defendant by publication thereof upon filing a verified complaint therein with the clerk of the district court of the county in which the action is commenced, setting forth a cause of action in favor of the plaintiff and against the defendant, and also filing an affidavit stating the place of the defendant's residence, if known to the affiant, and if not known, stating that fact; and further stating:

1. That the defendant is not a resident of this state; or,
2. That personal service cannot be made on such defendant within this state to the best knowledge, information and belief of the person making such affidavit; and in cases arising under this subdivision the affidavit shall be accompanied by the return of the sheriff of the county in which the action is brought, stating that after diligent inquiry for the purpose of serving such summons, he is unable to make personal service thereof upon such defendant.

The affidavit shall also state or the complaint show:

3. That the defendant is a resident of this state, and has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself secreted therein with a like intent; or,
4. That the action is for divorce or for a decree annulling a marriage.

. . . Service of the summons by publication may be made by publishing the same six times, once in each week for six successive weeks, in a newspaper published in the county in which the action is pending, if a newspaper is published in such county; and, if no newspaper is published in such county, then in a newspaper published at the seat of government of this state.

. . . A copy of the summons and complaint must, within ten days after the first publication of the summons, be deposited in some post-office in this state, postage prepaid, and directed to the defendant, to be

served at his place of residence, unless the affidavit for publication states that the residence of the defendant is unknown.

. . . After the affidavit for publication and the complaint in the action are filed, personal service of the summons and complaint upon the defendant out of the state shall be equivalent to and have the same force and effect as the publication and mailing provided for in this chapter.

. . . The first publication of the summons, or personal service of the summons and complaint upon the defendant out of the state, must be made within sixty days after the filing of the affidavit for publication, and, if not so made, the action shall be deemed discontinued.

. . . Service by publication is complete upon the expiration of *thirty-six days after the first publication* of the summons, or in case of personal service of the summons and complaint upon the defendant out of the state, *upon the expiration of fifteen days* after the date of such service.

. . . The defendant upon whom service by publication is made, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and *except in an action for divorce*, the defendant upon whom service by publication is made, or his representatives, may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just.

. . . Proof of the service of the summons and of the complaint or notice, if any accompanying the same, must be as follows:

1. If served by the sheriff or other officer, his certificate thereof; or,
2. If by any other person, his affidavit thereof; or,
3. In case of publication, an affidavit made as provided in section 522 of this code, and an affidavit of a deposit of a copy of the summons and complaint in the postoffice, as required by law, if the same shall have been deposited; or,
4. The written admission of the defendant.

. . . In cases of service otherwise than by publication, the certificate, affidavit or admission must state the time, place and manner of service.

SEC. 4904. From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings.

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